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HAROLD B. WILLEY,

PETITION FOR CERTIORARI

No. 823

In the

Supreme Court of the United States

October Term, 1956

RYAN CONSOLIDATED PETROLEUM CORPORATION,
Petitioner,

v.

W. L. PICKENS, *et al.*,
Respondents.

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W. L. PICKENS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Ryan Consolidated Petroleum Corporation, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Texas entered in the above entitled cause on November 23, 1955, Petitioner's Motion for Rehearing in the said cause having been denied January 11, 1956.

I. REPORTS OF THE OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Civil Appeals of the State of Texas in this cause is reported in *266 S. W. 2d 526*, and is printed in Appendix B hereto, infra, p. B-1; Record, p. 891. The original opinions of the Texas Supreme Court are printed in Appendix B hereto, infra, pp. B-19, B-37; Record, pp. 903, 915. The opinions of the Texas Supreme Court on rehearing are reported in *Tex. ; 285 S. W. 2d 201*, and are printed in Appendix B hereto, infra, pp. B-63, B-83; Record, pp. 932, 946.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED.

1. The final judgment of the Texas Supreme Court in this cause was rendered on November 23, 1955, and entered on November 23, 1955. Appendix C hereto, infra, p. C-7; Record, p. 886.

2. The order denying Petitioner's Motion for Rehearing by the Texas Supreme Court was rendered on January 11, 1956, and entered on January 11, 1956. Appendix C. hereto, infra, p. C-9; Record, p. 888.

3. Jurisdiction of this court to issue writ of certiorari is invoked under *28 U. S. C. Section 1257(3)*, since a title, right, and immunity is specially set up and claimed under the Constitution of the United States.

III. THE QUESTION PRESENTED FOR REVIEW.

Since Lots 10, 11, 12 and 13, involved herein, were owned in common as a single tract of land at the time the State

well-spacing laws became applicable thereto, such lots were required to be regarded as a single tract under the well-spacing laws, and, although this single tract was insufficient in size to constitute a regular well location under the spacing laws, it was, as an exception under such spacing laws, entitled to one well as a matter of right to prevent unconstitutional confiscation of its underlying oil and gas. Respondents acquired an oil and gas lease on Lots 10 and 11, and Petitioner later acquired an oil and gas lease on Lots 12 and 13. The State, in administering the spacing rules, located the one well to which the combined tract was entitled upon Respondents' portion of the combined tract, simultaneously denying Petitioner's application to drill the one well on its portion of the combined tract. The State has further authorized Respondents to produce the oil allocable to all four lots and has, in this cause, denied Petitioner any right to share in the production from said one well, or the proceeds therefrom, leaving the Petitioner the acknowledged owner of oil, but stripped by the State of all rights to reduce it to possession or to enjoy any benefits therefrom.

The question presented is whether Petitioner has been deprived of its property without due process of law and has been denied equal protection of the laws by the State which, having provided an exception to its spacing rules to prevent the unconstitutional confiscation of the property of Petitioner and Respondents, then granted all of the benefits of that exception to Respondents and deprived Petitioner of any enjoyment of the said property or the

proceeds therefrom by: (1) Prohibiting the Petitioner from drilling for, recovering, taking, using or enjoying any of such oil; (2) authorizing Respondents to drill on their part of the combined tract and thereby to appropriate the oil underlying the combined tract to their own use and enjoyment; and (3) denying Petitioner any right or interest in or against the said oil so taken or the proceeds therefrom or any remedy against Respondents who have taken all the said oil, where such denial is not reasonably necessary to the conservation of natural resources or any other public interest, all of which were fully satisfied by limiting the combined tract to one well, and none of which is concerned with the rights of the parties hereto to share the well's production.

IV. The Constitutional provision involved in this case is *Constitution of the United States, Amendment XIV, Section 1*, more particularly, that portion which provides:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V. STATEMENT OF THE CASE.

A. The Texas Legislature, having in view the public interest in the conservation of natural resources, authorized the Texas Railroad Commission to "make and enforce rules, regulations or orders for the conservation of" oil and gas "and to prevent the waste thereof • • •" *Article 6029, Vernon's Annotated Revised Civil Statutes of the State of Texas (Revision of 1925)*. Pursuant thereto the

Commission established, in 1919, its Statewide Rule 37 which undertook the prevention of waste by regulating the spacing of wells (Record, p. 388; 1940 amendment in effect at the time of the subdivision of the tracts in this case, Record, p. 390), it being the accepted view that regulation of the number and location of wells would result in the most oil being ultimately recovered. This statewide spacing rule reserved the power to establish separate rules for individual fields. Such a special rule has been promulgated for the Hawkins Field with which this litigation is concerned, establishing, in effect, a pattern of one well per twenty acres. Appendix A, infra, p. A-1; Record, p. 393. Both the statewide rule, and the special rule for Hawkins Field, provide for an exception to the regular spacing pattern where such an exception is necessary in order "to prevent waste or to prevent the confiscation of property."

This exception has been uniformly construed to entitle the owner of a tract, smaller than that required for a regular well location, to one well as a matter of right in order to prevent confiscation of his property, if such tract were in existence at the time the spacing rule became effective in the area. *Dailey v. Railroad Commission, Tex. Civ. App., 133 S. W. 2d 219 (error refused).*

However, where a subdivision of land into smaller tracts occurred after the spacing rule became effective in the area, the subdivided tract did not become entitled to an additional well as a result of the subdivision, since allowing each subdivided part a well to prevent confiscation would provide a means of completely avoiding the spacing

rule. *Sun Oil Co. v. Railroad Commission, Tex. Civ. App., 68 S. W. 2d 609 (affirmed 126 Tex. 269; 84 S. W. 2d 693).* The Railroad Commission adopted this construction in its order of May 29, 1934. Record, p. 389. Subdivisions which occurred after the spacing rule became applicable to a given area are merely disregarded for well permit purposes, the tract for such purposes is treated as it existed prior to the subdivision, and the combined tract is entitled to its one well. *Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S. W. 2d 967.*

The land involved in this controversy is comprised of Lots 10, 11, 12 and 13, each of which is 30 feet by 113 feet, the combined acreage of the four lots being approximately .4-acre. The four lots are contiguous and constituted a single tract owned by third persons at the time the spacing rule became effective in this area, and remained unsubdivided until October 18, 1940. At that time the single tract was subdivided into two parts, but, as shown above, this subdivision is disregarded for well permit purposes, and the acreage is treated by the Commission as a single tract of .4-acre. While this total acreage is insufficient to constitute a regular well location, the combined tract, thus considered, is nevertheless entitled to one well to prevent confiscation of the oil and gas underlying the .4-acre tract.

Subsequent to the subdivision of this .4-acre tract, Respondents, Pickens and Coffield, through mesne conveyances, became the owners of the leasehold interest in 5/6ths of the oil and gas underlying Lots 10 and 11. Through a later lease Petitioner became the owner of the leasehold

interest in 5/6ths of the oil and gas underlying Lots 12 and 13. The remaining 1/6th interest under the four lots is unleased.

Since the four lots, taken together, were entitled to one well as a matter of law to prevent the confiscation of the oil thereunder, Petitioner and Respondents each applied to the Railroad Commission for a permit to drill the well, each requesting that the well be located upon his lots, Respondents application stating: "The application involves, and is intended to involve the oil and gas leasehold rights, permit rights, and development rights, past, present and future, in *Lots 10 and 11*, Block 23, *as well as Lots 12 and 13*, Block 23, and particularly as those rights existed on and prior to October 18, 1940." (Emphasis added.) Record, p. 735. The Commission denied the application of the Petitioner and granted Respondents "a permit to drill *Well No. 1*, Heirs of H. C. Holmes, et ux., *Lots 10, 11, 12 and 13*, Block 23" (emphasis added), Record, p. 421, placing the well only 25 feet from the Petitioner's line. This action was upheld in *Pickens, et al. v. Ryan Consolidated Petroleum Corp., et al., Tex. Civ. App., 219 S. W. 2d 150 (error refused, no reversible error)*, but the court stated:

> "This judgment is without prejudice to the assertion by Ryan or other interested parties of any right which they may have in or to the oil and gas produced or to be produced from the well drilled by Pickens and Coffield on the lots in suit." *219 S. W. 2d at 155.*

Under the state's applicable proration order, one-half of the field's daily allowable production was allocated among each producing well in the proportion that the amount of

acreage assigned to a particular well bore to the acreage in the whole field. *Special Order of the Railroad Commission adopting Field Rules for the Hawkins Field*, Appendix A, infra, p. A-1; Record, p. 393. The state has allowed the well which Respondents were permitted to drill to produce that portion of the field's allowable production which the State's proration formula grants to a well producing from .4 of an acre. Respondents' monthly Producer's Report, Statewide Form EB, filed to show that the production each month had not been in excess of the allowable production for the well, states that the unit on which this well was located contained ".4" acres. Record, p. 745. Respondents' sworn Potential Test Form, Form 3, filed in order to have an allowable assigned to the well, states that the "number of acres in this lease" was ".40, Lots 10, 11, 12 and 13." Record, p. 738.

Thus, the State had permitted Respondents to drill the well to prevent confiscation of the property under the four lots, Respondents had drilled the well and were producing therefrom, under authorization of the State, oil allocable to the *four* lots.

Unless Petitioner is allowed to share in the profits from the well producing for the four lots, its property has obviously not been protected by the exception which purports to prevent confiscation of the property of all four lots. Certainly, confiscation of Petitioner's property is not prevented by giving it to Respondents. Thus, Petitioner, to protect his said property, petitioned the Railroad Commission to establish Petitioner's right to participate in the

production from the well in the proportion which the acreage of Petitioner's tracts bore to the entire .4 acre, viz: one-half of the net proceeds. The Commission held that it did not have the authority to grant relief, but stated that its holding was without prejudice to the right of Petitioner to seek relief elsewhere. Record, p. 493.

The Commission being without authority to grant relief, Petitioner then instituted this suit in the State Courts to establish its right to participate in the production from the well or the proceeds therefrom. Petitioner is not herein complaining of the Railroad Commission's order giving Respondents permission to drill the well, nor is Petitioner herein asking that it be permitted to drill a well, and thus is asking nothing violative of the public interest, but Petitioner asks that it receive its just portion of the production from the well already drilled.

The decision of the Texas Supreme Court in the present case in effect announced that the action of the Railroad Commission in locating the well on Respondents' part of the tract necessarily deprived Petitioner of any enjoyment of its interest in the tract and conferred the entire benefits upon Respondents. This final opinion of the Court did not deal expressly with the constitutional questions involved (Appendix B, infra, p. B-63) in spite of their having been repeatedly and appropriately called to the court's attention in a manner consistent with the practice in the State,

as shown herein, infra, this page. But the dissenting opinion, entered on behalf of three of the Justices, warned:

> "* * * The majority opinion permits the confiscation by Pickens and Coffield of minerals belonging to Ryan. In doing so, the constitutionality of Rule 37 is put in question in that Ryan is deprived of its property without due process of law." Appendix B, infra, p. B-63; Record, p. 946.

B. HOW THE FEDERAL QUESTION WAS PRESENTED IN THE STATE COURTS.

The Constitutional questions forming the basis of this application to this Honorable Court were urged upon the state courts as follows:

In its petition in the trial court, Petitioner asserted its constitutional rights as follows:

> "Plaintiff would further show that * * * it acquired title to 5/6ths of 7/8ths (five-sixths of seven-eighths) of the oil and gas in and under said lots * * * and that neither the Railroad Commission of Texas nor the Courts of the State can deprive the Plaintiff of such property without due process of law. In this connection, Plaintiff respectfully shows that it is unable to produce any of the oil owned by it under Lots 12 and 13 and unless Plaintiff is permitted to share in the production from the well located upon Lot 11, as prayed for herein, Plaintiff will have had its property rights completely confiscated without due process of law in violation of Article (sic) XIV of the Constitution of the United States * * *." Record, p. 767.

The trial was before the Court without a jury, and from a Judgment that Ryan take nothing by its suit (Appendix C, infra, p. C-1; Record, p. 863), Petitioner appealed to the

Court of Civil Appeals preserving and renewing its plea for protection of its constitutional rights in its second point of error as follows:

> "Where the only remedy available to one of two equal subdivision lessees to prevent the confiscation of the oil owned by it under a small tract, upon which the law permits only one well to be drilled, is participation in the production of that well upon an equitable basis, the denial of that remedy constitutes confiscation of property in violation of State and Federal Constitutional provisions prohibiting the taking of property without due process of law and guaranteeing the equal protection of the law." Appellant's Brief in the Court of Civil Appeals, Record, p. 965.

This constitutional question was reiterated and again emphasized in the argument under the point. Record, p. 1009.

The Court of Civil Appeals upheld the trial court (Appendix B, infra, p. B-1; Appendix C, infra, p. C-4; Record, p. 882) and in its Motion for Rehearing, Petitioner repeated the point of error contained in its original brief. Record, p. 1046. Its motion being denied (Appendix C, infra, p. C-6; Record, p. 883) Petitioner then perfected its Application for Writ of Error in the Supreme Court of the State of Texas and urged in its Point of Error No. 2:

> "The Court of Civil Appeals erred in failing to hold that where the only remedy available to one of two equal subdivision lessees to prevent the confiscation of the oil owned by it under a small tract upon which the law permits only one well to be drilled, is participation in the production from that well upon an equitable basis, the denial of that remedy constitutes confiscation of property in violation of State and Federal constitutional provisions prohibiting the tak-

> ing of property without due process of law and guaranteeing the equal protection of the laws. (Germane to Third Assignment of Error in Motion for Rehearing.)" Record, p. 1061.

This point was again called to the attention of the Supreme Court of Texas, explained and amplied in the argument in the said Application, Record, p. 1094. The State Supreme Court reversed the lower courts and held for the Petitioner in a five-four decision, a dissenting opinion being written. Appendix B, infra, pp. B-19, B-37; Record, pp. 903, 915. Respondents having filed a Motion for Rehearing, the Texas Supreme Court reversed its earlier position, withdrew its original opinion, and substituted another therefor, a dissenting opinion again being written on behalf of three members of the Court. Appendix B, infra, pp. B-63, B-83; Appendix C, infra, p. C-7; Record, pp. 932, 946, 886.

Thereupon, Petitioner filed its Motion for Rehearing in the State Supreme Court, and asserted in its first Point of Error the unconstitutionality of the decision as follows:

> "The court erred in failing to protect the Petitioner's property against confiscation without due process of law and in denying to Petitioner the equal protection of law, in violation of Amendment Fourteen, Section 1, to the Constitution of the United States, and Article I, Section 19, of the Constitution of the State of Texas." Record, p. 1226.

This motion was overruled by the court without opinion. Appendix C, infra, p. C-9; Record, p. 888.

VI. REASONS FOR GRANTING WRIT OF CERTIORARI.

1. The question here involved has not been decided heretofore by any court. The decision of the state court, therefore, standing alone, will bear heavily upon the development of the law in this field. Petitioner urges that the following of this decision by the courts of the other states will result in a compounding of error which will cause great damage to small tract owners throughout the nation and which this court will eventually be called upon to overturn. An authoritative decision with full discussion at this time is greatly to be preferred.

To evaluate correctly the significance of this controversy, it would seem helpful and proper for this Court to take judicial notice of the unusual attention given to this case by the Bar of the nation and by the members of the oil and gas industry, and of the central importance of the lessee's property rights to this basic oil and gas industry. The opinions, only months old at this writing, have been given attention in: *18 Texas Bar Journal 234; 19 Texas Bar Journal 95; 5 Oil & Gas Reporter 99; 4 Oil & Gas Reporter 701; 33 Texas Law Review 963; Summers, Law of Oil & Gas, Vol. I, 1955 Pocket Part, Sections 61, 63, 86; 7th Institute on Oil & Gas Law & Taxation Proceedings, Southwestern Legal Foundation, ...; 10 Southwestern Law Journal, ...*.

The facts of the case and the nature of Petitioner's claim manifestly demonstrate their own widespread potential applicability and importance. A decision of this case will

clarify important questions as to the protection the Constitution of the United States affords property rights throughout all oil producing states, for "the legal interest of the landowner and of his lessee respecting oil and gas is practically the same in all jurisdictions." *Summers, The Law of Oil & Gas, Volume 1A, Section 106.* Furthermore, and of at least equal importance, the principles involved are not restricted to the taking of oil interests, but are pivotal in all cases wherein a state seeks to control, regulate, appropriate or convert to another an interest, right or property of one of its citizens.

2. Petitioner would show the Court that the decision of the Texas Supreme Court is in conflict with the principles announced in the opinions of this Honorable Court and other courts; and that the said decision is especially in conflict with the interpretation and application given by the Supreme Court of California to the Constitutional guarantees here invoked.

The right of an oil and gas lessee, A, to the oil underlying his tract was early declared to be A's property subject to the right of his neighbor, B, drilling on B's own land to drain oil from A's tract and appropriate it to B's own use and enjoyment. *Ohio Oil Co. v. Indiana, 177 U. S. 190.* The rule of non-liability for drainage, the so-called "Rule of Capture," was justified only by the fact that the owner whose oil was being drained had the right to drill his own offset well and thus protect his property. That the Rule of Capture is founded upon a corresponding right in the injured owner to protect himself by drilling his own

well is well stated in the dissenting opinion in the Texas Supreme Court in this case:

> "This equal right to drill has always supported the constitutionality of the rule of capture. Take it away and the reason for the rule fails, leaving a result not only unjust but one inconsistent with the fundamental concept of ownership of oil and gas in place as a part of the realty. Drainage of adjoining property under the law of capture was rationalized with ownership in place in Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566, on the basis of equal rights to drill. Under our law no one has a right simply to capture the property of someone else." Appendix B, infra, p. B-84; Record, p. 946.

See also: *Kelly v. Ohio Oil Co., 57 Ohio St. 317, 49 N. E. 399; Barnard v. Monongahela Gas Co., 65 A. 801, 216 Pa. 362.*

The property of an oil and gas lessee at common law consisted of various rights and interests: (1) Ownership of oil in place subject to his neighbor's right to capture, (2) an equal right to capture and exercise self help to obtain his fair share of the oil in the reservoir, (3) so-called "Correlative rights" which assured him that his neighbor would not be allowed to go beyond the natural exercise of the rule of capture and thereby take more than his fair share of the oil from the reservoir. *Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S. W. 2d 558.* All of these amounted to a right to an opportunity equal to that of other owners overlying a common reservoir to the enjoyment of the oil underlying that common reservoir, or, as stated by the Texas Supreme Court: "Every owner or

lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation." *Marrs v. Railroad Commission, 142 Tex. 293, 303, 177 S. W. 2d 941, 948.* This right to such a fair chance has been unnecessarily taken from Petitioner.

These rights and interests, severally and in the aggregate, amounted to property, the taking of which, unless necessary to a valid public interest, has been declared by this Court and other courts to be violative of the Constitution. *Thompson v. Consolidated Gas Utilities Corporation, 300 U. S. 55; Sterling v. Constantin, 287 U. S. 378; Ohio Oil Co. v. Indiana, 177 U. S. 190.* In *Sterling v. Constantin,* which involved the property interests of an oil and gas lessee in Texas, this Honorable Court said: "Their (the lessee's) right to the enjoyment and use of these properties, subject to reasonable regulations by the state in the exercise of its power to prevent unnecessary loss, destruction and waste, is protected by the due process clause of the 14th Amendment." *287 U. S. at p. 396.* In the *Ohio Oil* case it is said "* * * as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply." *177 U. S. at p. 209.* "Nor can it be logically maintained that these rights, privileges and duties of a landowner respecting oil and gas do not constitute property

or any sort of an interest in land." *Summers, The Law of Oil & Gas, Volume 1A, Section 106.*

The Supreme Court of California has called the lessee's interest a "right, coequal with the right of surrounding owners and lessees, to recover their fair share of the oil and gas from the common source of supply," the taking of which by not allowing a well "deprived (the lessors and lessee) of the use and enjoyment of their coequal right" in violation of Amendment XIV. *Bernstein v. Bush, 29 Cal. 2d 773, 177 P. 2d 913.* See also *Richfield Oil Corp. v. Crawford, Cal. App., 241 P. 2d 1020 (affirmed 249 P. 2d 600).*

The entire oil and gas industry is based upon the lessee's function and this is true throughout this country. Certainly, any failure on the part of the courts to enforce the guarantees of the 14th Amendment as to lessees' property undermines the foundation of this essential industry.

The significance of this case may be brought into sharper focus by reiterating that Petitioner is not complaining of the State's denying it the right to drill, but the relief sought is only that Petitioner be allowed to recover from Respondents the equitable portion of the net proceeds of the oil produced from that well which Respondents were allowed to drill as an exception to the regular spacing rule to prevent confiscation of the oil under four lots, two of which are owned by Petitioner. The right of Petitioner to drill a well on its two lots conflicted with the public interest in well spacing (for conservation) and therefore gave way. Only one well was to be drilled, the application for a well

to prevent confiscation was required by the State to cover all four tracts *(Railroad Commission v. Miller, Tex. Civ. App., 165 S. W. 2d 504)*, the well was located on Respondents' tract a mere 25 feet away from Petitioner's land and was allowed to produce a quantity of oil allocable to all four tracts, and thus, says the opinion of the State court, it was *necessary* to deprive Petitioner of all enjoyment of his property and bestow it upon Respondents. **Obviously, such a result is not necessary, for granting the relief sought in this case would prevent that taking and would not interfere with any public interest.** In fact, it has been *assumed* that subdivision lessees not allowed a well under the spacing rules would necessarily share in the oil produced from the subdivision which was allowed a well, so that they would not wholly lose their oil.

> "We suppose that if the Commission denies to any subdivision of such tract its own well that it can make some just apportionment of the oil produced on those subdivisions which are allowed a well; it being implied, if not expressed, in the act of subdivision that owners not allowed a well are wholly to lose their oil." *Magnolia Petroleum Co. v. Blankenship, 85 F. 2d 553.*

Regarding the exception to prevent confiscation, the Texas courts early said: "by this exception alone the rule is saved from attack upon the grounds that it gives the Commission the power to destroy vested rights." *State v. Jarmon, Tex. Civ. App., 25 S. W. 2d 936, 939 (error dismissed).* The Supreme Court of a sister state has declared unconstitutional the conservation scheme of its state legislature where no comparable exception was made, declaring

that the State was required to protect the "coequal right." *Bernstein v. Bush, 29 Cal. 2d 773, 177 P. 2d 913.* If the Texas Supreme Court opinion in the present controversy means that the "coequal rights" of small tracts need not be thus protected from confiscation, then this opinion conflicts directly in its basic theory with that of the California Supreme Court in the *Bernstein* case and clearly this Honorable Court should reconcile that conflict. If, however, the Texas Supreme Court does not deny the necessity of such an exception to prevent confiscation, can the state having thus purported to grant such an exception, free its actions from the stigma of confiscation where it, in fact, protects only *some* of the property which the exception purports to cover, where there is no distinction between the property protected and that left unprotected which would compel such an unequal treatment?

The Supreme Court of California has explained the duties cast upon the state by the United States Constitution, as follows:

> "In the absence of statutory prohibition, the right to drill an offset well was commonly resorted to as a means of protection by an owner whose property was being drained by a well drilled on adjoining land. The wasteful use of offset wells was recognized as one of the evils sought to be minimized by the enactment of well spacing regulations * * *. But since the mere opportunity for voluntary pooling of interests does not afford equal protection within the meaning of the federal and state Constitutions, regulatory provisions which in effect prohibit the drilling of offset wells may amount to a denial of the equal protection of the law and a taking of private property without due

process of law. *Equal protection is so denied where, as here, the law,* in its application *does not afford adequate means of protection as a substitute for the right to drill an offset well.*" (Emphasis added.) *Bernstein v. Bush, 29 Cal. 2d 773; 177 P. 2d 913, 918.*

While this language was dictum in the *Bernstein* case, it has since been applied as the test of constitutionality where violation of the federal due process and equal protection clauses have been urged. Thus, in *Hunter v. Justice Court, 36 Cal. 2d 315, 223 P. 2d 465,* where the right to drill was taken from the petitioner and his tract was pooled with surrounding tracts under the applicable state statute, the constitutionality of that statute was said to be dependent upon and was tested by "whether * * * Section 3608, as applied to Petitioner, gives him an 'adequate means of protection (or) substitute,' for his right to extract oil from his property." *223 P. 2d at p. 467.*

There can be no doubt that the California courts, applying this test, would find your Petitioner had been deprived of its property in violation of the Federal Constitution. There can be no doubt that the same Constitutional guarantees should be available to Petitioner in Texas. There is no difference in fact between a land owner's right to his oil in California and in Texas. There has been no difference in the legal definition of this property in the two states up to this time. Indeed, the courts of the two states cite each other's opinions liberally and the California cases mentioned herein rely in part on Texas cases. If, then, the

Texas courts may now deprecate this valuable property right, traded daily in the business world at great prices, and remove it from the constitutional proscription by refusing it the definition of "property," then this fundamental guarantee of due process is reduced to a handy implement of the Court's discretion, and this treatment left standing in what must become a landmark case in this country will serve as precedent for confiscation by definition until this Honorable Court, plagued by petitions for certiorari, one day makes the ruling Petitioner now requests.

Since Petitioner already owns a "fair chance to recover the oil or gas in or under his land, or their equivalent in kind," *Marrs v. Railroad Commission, 142 Tex. 293, 303; 177 S. W. 2d 941, 948*, it is only asking here that such fair chance not be taken from it, as such taking obviously benefits, not the public, but only Respondents. Petitioner's right to drill its own well as a *means* of enjoyment must be restricted, but the sharing of the proceeds from the well drilled by Respondents for all four lots is a substitute means of enjoyment and is sought in this case. If it appears to the public interest to restrict one *means* of enjoying that property right, surely that does not compel a total deprivation where other means of enjoyment are available "as a substitute." Especially is that true where, as here, two equal owners should bear the burden of the public interest in well spacing and the "substitute" can be provided merely by making them share the burden

equally. Especially is that true where, as here, one of the equal owners is allowed to drill a well and produce therefrom not only such an amount of the field's allowable production as would be proportionate to his *own* tract's acreage, but also an additional amount by adding the acreage in the *other's* tract to his own acreage. Where *one* is allowed to take the same amount of oil that the *two* would have been allowed to take, can it be serving the public interest for the one to keep the other's oil or the proceeds therefrom?

The implications of this case are of fundamental importance and universal applicability. Could a State, having decided that there was a public interest in limiting the number of buildings on a block, authorize the owner of half of that block to build a structure on the *whole* block and deny the owners of the other half any right or remedy?

Admitting that not more than one well should be placed upon the combined tract, still it seems clear that *unnecessarily* choosing between two equal landowners and placing the entire burden of sustaining that public interest on one of the two, so that one reaps all the property rights of both from a well granted to prevent the confiscation of the property of both, and without having to account to the other, is confiscation of property and is such an unequal treatment as to violate due process of the law. Property rights in the oil produced from that one well have no relationship whatsoever to the prevention of waste.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ADMINISTRATIVE ORDERS

Railroad Commission of Texas

OIL AND GAS DIVISION

Oil and Gas Docket No. 120
#6-2215

In Re: Conservation and Prevention of Waste of Crude Petroleum and Natural Gas in the Hawkins Field, Wood County, Texas.

Austin, Texas,

January 22, 1941.

SPECIAL ORDER ADOPTING AND PROMULGATING FIELD RULES FOR THE HAWKINS FIELD, WOOD COUNTY, TEXAS

WHEREAS, The Railroad Commission of Texas, after due notice, held a hearing at Hawkins, Texas, on Monday, January 20, 1941, for the purpose of considering the adoption of rules and regulations for the Hawkins field, Wood County, Texas; and

WHEREAS, It appears to the Commission from evidence submitted to it at this hearing and from further study of said field by its engineering staff, that waste

as defined in Article 6014, Revised Civil Statutes, as amended, will result in the drilling and operation of wells in what is known as the Hawkins field, Wood County, Texas, unless rules, regulations and orders are adopted for the prevention of waste;

THEREFORE, IT IS ORDERED By the Railroad Commission of Texas that the following rules and regulations be and the same are hereby adopted effective this date to be maintained in effect, in addition to the general conservation rules and regulations governing said field, for this field or extensions thereof until further ordered by the commission;

Rule 1. (a) No well shall be drilled hereafter for oil and gas or either of them nearer than nine hundred thirty-three (933) feet to any other completed or drilling well on the same or adjoining tract or farm, and no well shall be drilled nearer than four hundred sixty-six (466) feet to any property line, lease line or subdivision line; provided that, subject to the further provisions hereof, the commission, in order to prevent waste or to prevent the confiscation of property, will grant exceptions to permit drilling within shorter distances than above prescribed whenever the commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When exceptions to this rule are desired, application therefor shall be filed with the commission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one

inch equalling four hundred (400) feet, accurately showing to scale the property on which permit is sought to drill a well under the exception to this rule, and accurately showing to scale all other completed, drilling and permitted wells on such property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that all facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exceptions shall be granted only after at least ten (10) days' notice to all adjacent lessees, affected thereby, has been given, and after public hearing at which all interested parties may appear and be heard, and after the commission has determined that an exception to this rule is necessary either to prevent waste or to protect the property belonging to applicants from confiscation. All pending applications shall be amended to conform to this rule before being acted upon.

(b) In applying this rule, the general order of the commission with relation to subdivisions of properties, shall be observed.

RULE 2. The casing program of all wells hereafter drilling in such field shall include a surface string and a producing oil string set in accordance with the following plan.

(a) The surface string shall be new or reconditioned pipe which has been tested to 1200 pounds per square inch and shall be set and cemented at a point at least fifty (50) feet below the top of the Midway shale section and at least sixteen hundred (1600) feet below the surface. Sufficient cement shall be used to fill the calculated annular space back of the pipe to the surface. Cementing shall be by the pump and plug method. Cement shall be allowed to stand a minimum of 12 hours under pressure and a total of 24 hours before drilling plug or initiating test. Casing shall be tested by pump pressure in the following manner: the mud-laden fluid in the hole shall be replaced by clear water and pump pressure of at least 1000 pounds per square inch applied. If at the end of thirty (30) minutes the pressure shows a drop of 150 pounds per square inch, the casing shall be condemned. After the corrective operation the casing shall be tested in the same manner.

(b) The producing or oil string shall be set below the gas-oil contact and shall be new or reconditioned casing which has been tested to 2000 pounds per square inch, and after cementing shall be tested by pump pressure in the following manner: the mud-laden fluid in the hole shall be replaced with clear water and pump pressure of at least 1000 pounds per square inch applied. If at the end of thirty (30) minutes the pressure shows a drop of 150 pounds per square inch, the casing shall be condemned. After the corrective operation the casing shall be tested in the same manner. Christmas Tree fittings and wellhead connections shall have a mill test pressure of at least

four thousand (4000) pounds per square inch and the tubing shall be equipped with two (2) master valves. Cementing shall be by the pump and plug method. Sufficient cement shall be used to fill the annular space behind the casing to a point at least 1200 feet above the shoe. Cement shall be allowed to stand a minimum of 24 hours under pressure and a total of 48 hours before drilling or initiating test.

RULE 3. A blow-out preventer for keeping the well under control shall be installed as soon as surface casing has been set. The blow-out preventer shall be tested against pump pressure at least once every 24 hours; and the blow-out preventer and the necessary auxiliary equipment shall be of good working order and condition at all times.

RULE 4. All wells shall be equipped with Bradenheads with a mill test pressure of not less than four thousand (4000) pounds per square inch. Bradenheads shall not be welded in except for pressure seal, and as soon as installed the same shall be equipped with the proper pipe connections and valves accessible to the surface.

RULE 5. All flowing wells shall be equipped with and produced through tubing of not more than two and one-half (2½) inches in diameter. A Pin, perforated bull plug, or other device shall be installed on the bottom of the tubing to prevent subsurface pressure bomb from passing out of the tubing should such bomb become disconnected from wire line.

RULE 6. All flowing wells shall be produced through an oil and gas separator in good working order. Sufficient tankage shall be available to each lease to permit proper taking of the allowable production. All wells shall be equipped with adequate chokes or beans to control properly the flow thereof.

RULE 7. All wells shall be cleaned into a pit not less than forty (40) feet from the derrick floor and one hundred fifty (150) feet from any fire hazard.

RULE 8. No boiler, flare, or electric generator shall be placed or remain nearer than one hundred fifty (150) feet to any producing well or oil tank into which the well is produced.

RULE 9. All swabbing and bailing operations shall be completed in the daylight hours. Drill stem tests shall likewise be made during the daylight hours as far as practicable.

RULE 10. All permanent oil tanks, or battery of tanks, must be surrounded by a dyke or fire wall with a capacity of at least one and one-half (1½) times that of the tank or battery of tanks.

RULE 11. Any rubbish or debris that might constitute a fire hazard shall be removed to a distance of at least one hundred fifty (150) feet from the vicinity of wells, tanks, and pump stations. All waste shall be burned or disposed of in such manner as to avoid creating a fire hazard or polluting nearby waters.

RULE 12. Each flowing well shall be tested for a period of twelve consecutive hours through a positive choke not larger than one-fourth (¼) inch in diameter by six (6) inches in length. The daily individual well potential production shall be the total barrels of oil such well produces during the last six hours of the twelve (12) hour period multiplied by four (4).

RULE 13. All wells producing two (2) per centum or more salt water must be reported by their owner or operator to the commission office.

RULE 14. The net gas-oil ratio of each well in the field in no event, unless otherwise provided herein, shall exceed seven hundred (700) cubic feet of gas per barrel of oil produced; provided, however, any oil well producing with a net gas-oil ratio in excess of seven hundred (700) cubic feet per barrel shall be allowed to produce daily a volume of gas equivalent to the volume obtained by multiplying the daily oil allowable of such well, as determined by Rule 15, by seven hundred (700) cubic feet. This amount of gas will be known as the "gas limit" of each such oil well; and no such well shall be permitted to produce an amount of oil per day which exceeds that quantity of oil which can be produced within such gas limit. By the phrase "net gas-oil ratio" is meant the amount of gas produced from a well, less the amount of gas, if any, returned to the same producing formation, divided by the number of barrels of oil concurrently produced from the well. Gas wells producing from the same reservoir as oil wells shall likewise be allowed to produce daily as a maximum that num-

ber of cubic feet of gas equivalent to the production of the highest daily oil well allowable in the field, multiplied by seven hundred (700) plus a volume of gas equivalent in the reservoir to the daily volumetric oil withdrawal from any oil well.

RULE 15. The proration unit shall be twenty (20) acres, and no acreage shall be assigned to a unit which is more than 1,050 feet from a producing oil well. A tolerance of ten (10) acres on the last well on producing tracts of more than twenty (20) acres shall be allowed where the size and shape of the tract so warrants. Where tolerance is allowed, no acreage shall be assigned to the unit of the last well which is more than 1,280 feet from the well. Units which do not contain as much as twenty (20) acres shall be considered as fractional units. Acreage units or fractions thereof whether containing more or less than twenty (20) acres will be considered, for proration proposes, on the basis of the actual acreage assigned to the individual unit or fractional unit.

The total daily field allowable as fixed by the commission shall, after deductions have been made for marginal wells, be prorated on the following basis:

(a) Fifty (50%) per cent of the field outlet shall be allocated among the producing units and fractional units in the field on the basis of the ratio between the acreage in each unit or fractional unit and the sum of the acreage in all of the producing units and fractional units in the field; and

(b) Fifty (50%) per cent of the field outlet shall be distributed equally among the wells in the field.

RULE 16. All wells shall be equipped in such manner that the duly authorized agents of the commission can make potential tests, gas-oil ratio tests, bottom-hole pressure tests, and any other tests which may be deemed necessary on any well at any time, and the owner of such wells is hereby directed to do all things that may be required of him by the commission agents to properly make such tests.

IT IS FURTHER ORDERED That this cause be held open on the docket for such other and further orders as may be necessary and supported by evidence of record.

RAILROAD COMMISSION OF TEXAS
Ernest O. Thompson, Chairman
Jerry Sadler, Commissioner
Olin Culberson, Commissioner

(SEAL)

ATTEST:

C. F. Petet, Secretary.

APPENDIX B

OPINION IN THE COURTS BELOW

No. 6704

In the

Court of Civil Appeals of Texas

for the

SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

Appeal from District Court of Wood County, Texas

RYAN CONSOL. PETROLEUM CORP.

Appellant,

v.

PICKENS, *et al.*

Appellees.

Feb. 4, 1954

In the opening paragraph of appellant's brief, it makes the following statement of the nature of the suit, which is concurred in by appellees:

"This is a suit for equitable relief against the confiscation of its property and property rights instituted by Ryan Consolidated Petroleum Corporation, hereinafter

referred to as Ryan, as the owner of 7/8 oil, gas and mineral leasehold interest in 5/6 of the minerals underlying lots 12 and 13, against W. L. Pickens and H. H. Coffield, hereinafter sometimes referred to as Pickens and Coffield, owners of a 7/8 oil, gas and mineral leasehold interest in 5/6 of the minerals underlying lots 10 and 11." Ryan has appealed from a "take nothing" judgment rendered by the trial court without intervention of a jury. The court filed his findings of fact and conclusions of law.

On and prior to October 18, 1940, lots 10, 11 and 12 were owned in fee simple by the heirs of H. C. Holmes and wife, both deceased, and they had a good limitation title to Lot 13, conceded by all parties and so found by the trial court. These four lots extended in a north and south direction and together constituted a .4 acre tract. Each of the lots is 30 feet wide and 113 feet long. Lot 10 is the most easterly and Lot 13 is the most westerly. Lots 11 and 12 lie in between 10 and 13.

On October 18, 1940, adult Holmes heirs executed an oil and gas lease to Kermit Smith and Frank Morrison on the four lots, the interest of the lessors being 2/3. On November 9, 1940, the minor three heirs, acting through their guardian, executed two leases to Frank Morrison, covering the remaining 1/3 interest in the four lots. It appears that a controversy arose as to whether it was intended to include 12 and 13 in these leases and the controversy was settled by release of lots 12 and 13 therefrom, and thus the oil and gas leases to lots 10 and 11 remained in Smith and Morrison.

On December 26, 1940 Coffield became the owner by assignment of the leases covering lots 10 and 11, and on December 28, 1940, he assigned said leases insofar as they covered lot 11 to Pickens. Coffield and Pickens remained owners in severalty of lots 10 and 11, respectively, until August 7, 1946, upon which date they converted their separate interests into a joint interest by proper assignments, each thereby becoming the owner of an undivided ½ leasehold interest in lots 10 and 11, except as to a 1/6 interest.

By instruments dated December 26, 1940, and February 17, 1941, Ryan became the owner and holder of a ⅞ leasehold interest in oil and gas under lots 12 and 13, except an undivided 1/6 interest therein, given by the Holmes heirs, minors, acting through their guardians.

On November 14, 1945, Pickens and Coffield jointly with the Railroad Commission filed their application to drill an oil well on lots 10 and 11, or either of them. This was docketed as case No. 31816-A.

On November 16, 1945, Ryan filed its application to drill an oil well on lots 12 and 13, or either of them, the case being docketed by the Railroad Commission as No. 31814-A. On December 21, 1945, both applications were denied by the Commission, but on February 26, 1946, the Commission granted rehearings in each application.

On April 3, 1946, Pickens and Coffield were granted a permit to drill a well in the geographical center of the four

lots and the application of Ryan for a permit was again denied.

A few days thereafter, however, all parties were granted a rehearing by the Commission.

On July 3, 1946, the application of Pickens and Coffield was granted by the Commission and they were authorized to drill an oil well on the south part of Lot 11, 25 feet north of the south line and 25 feet east of the west line of lot 11, that is, 5 feet west of the east line of said lot. On July 5, 1946, Ryan's application for a well on lots 12 and 13 was again denied. Ryan's application for rehearing of the order granting permit to Pickens and Coffield, as well as its application for a rehearing of the order denying its own application were both denied.

Ryan appealed from these orders to the district court of Travis County and said suit was docketed Ryan Consolidated Petroleum Corporation v. Railroad Commission, No. 76490. After hearing the district court of Travis County set aside the order of the Railroad Commission granting a permit in favor of Pickens and Coffield and affirmed the order of the Commission insofar as it denied a permit to Ryan. From the judgment of the district court of Travis County all parties appealed to the Austin Court of Civil Appeals. The Court of Civil Appeals thereafter reversed the judgment of the district court of Travis County insofar as it set aside the order of the Commission granting a permit to Pickens and Coffield, and affirmed the order of the Commission in granting such permit. The

Court of Civil Appeals affirmed the order of the district court insofar as it upheld the action of the Commission in denying permit to Ryan. Pickens v. Ryan Consolidated Petroleum Corporation, Tex. Civ. App., 219 S. W. 2d 150, 153. Ryan's application to the Supreme Court for a writ of error was denied, no reversible error.

Pickens and Coffield completed an oil well to production at the location on lot 11, fixed by the Railroad Commission.

The foregoing facts are without dispute in the record and were so found by the trial court. The material facts in this entire case are practically without dispute, so far as they control the disposition of the issues arising in this appeal, and except as otherwise indicated we adopt the findings of the trial court as to such material facts. There were numerous defendants in the case, but their interests are subsidiary and it is not necessary to name them nor to define their interests. All of the defendants who have filed briefs adopt the briefs of the appellees.

The principal question presented by this appeal is whether, under Texas law, where four lots, comprising together a .4 acre tract of land, under well-spacing laws and the rules and regulations of the Railroad Commission of this state, was entitled to and granted permit to drill only one well to "prevent confiscation and waste," it was error to deny one of two equal subdivision lessees a right to share in the production from that well so drilled by the other lessee upon a proportionate basis, or whether, as the trial

court held, the owners of the oil interest under the separate tract on which the well was drilled are entitled to all the oil produced from such well, less, of course, royalties due from the well to the fee owners of the separate tract.

The Austin Court of Civil Appeals in passing upon the phases of this matter there involved in the case of Pickens v. Ryan Consolidated Petroleum Corporation, supra, used the following language: "By their second assignment the appellants complain of the error of the court in holding that no permit could be granted by the Commission until the said four lots had been pooled for such production, and an application for the joint development of the four lots for the use and benefit of all owners had been made. In its findings of fact and conclusions of law, the court, among others, filed conclusion No. 4, as follows: 'Said four lots being capable of full development as a whole or entire tract for oil and gas purposes by one well, and being entitled to at least one well, but neither said lots Nos. 10 and 11, considered as a unit, nor said lots Nos. 12 and 13, considered as a unit, being capable of separate development in compliance with the rules and regulations of the Railroad Commission applicable to said field, the owners of leases in said four lots should be relegated to the situation as it existed prior to the subdivision of said four-lot area into separate lease tracts, which was a joint right to drill for the benefit of the owners of the oil, gas and other minerals in and under all four lots and the owners thereof have not been and are not so relegated until their separate lease tracts have been reunited as they were prior to leasing,

either by pooling or by application for the joint development of the four lots for the use and benefit of the owners of the said four lots, neither of which has been done. The Railroad Commission, therefore, either should have denied both applications or withheld action thereon until such had been done, and its failure so to do is arbitrary, capricious, improper and unjust in that the granting to one and denying to the other of the applicants a permit to drill constitutes an attempt by the Commission to decide and declare priority of rights when no priority of rights exists.' *This conclusion we do not believe finds support in law or in fact.* Art. 6014, Subd. g, Vernon's Texas Civil Statutes, reads as follows: '* * * however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership.' The Railroad Commission has the power and duty to adopt rules concerning the conservation of the mineral resources of the State, but cannot limit the right to convey or partition by the owner of his land as to surface or mineral estate; such owner or owners cannot as a result of such conveyance of mineral estate secure an advantage, and thereby secure permits for wells on such subdivision. * * * *The Railroad Commission does not have the power to force a pooling agreement upon unwilling owners of mineral estates, and the trial court in this case did not have the power or authority to force a pooling of the mineral estate.* * * * This judgment is without prejudice to the assertion by Ryan or other interested parties of any right

which they may have in or to the oil or gas produced or to be produced from the well drilled by Pickens and Coffield on the lots in suit. * * *."

In resolving the questions presented we must keep in mind some well settled rules established by our courts. "* * * the doctrine of ownership in place obtains in this state, the oil and gas beneath the soil being considered a part of the realty, so that, in the absence of a severance by sale or otherwise, each owner of land owns separately, distinctly, and exclusively all of the oil and gas beneath his land (See Tex. Jur., Vol. 31A, sec. 6, for authorities) *and is not a mere joint owner with other adjoining land owners in a common pool of oil beneath the several tracts of land, with a mere right to mine therefor.*" (Emphasis added.) Magnolia Petroleum Co. v. Zeppa, Tex. Civ. App., 70 S. W. 2d 777, 779, wr. ref. The owner of the fee has the right to prospect for, develop and produce the oil and gas lying in place under his land, subject to the conservation laws of this state. Marrs v. Railroad Commission, 142 Tex. 293, 177 S. W. 2d 941, 948, and subject to the law of capture, Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S. W. 2d 558, 561, 4 A. L. R. 2d 191.

Oil well drilling permits are granted by the Railroad Commission in the administration of conservation laws. When a permit is granted it is restricted to a specific location and none other may be substituted without approval of the Commission. Its only function, and the only right granted, is to drill a well at the particular location, and in compliance with rules of the Commission. It

carries no restrictions against assignment or transfer of the right to drill, nor against assignment or conveyance of the land in whole or in part. The area included in the application and in the Commission's order and the general location of the land are material only insofar as they inform the Commission of fact to enable it to act under spacing Rule 37. The order of the Commission granting a permit is in the nature of a license, and does not vest any interest in any person to the oil or gas in place or which may be produced. These rights last named rest upon muniments of title. A drilling permit is not a muniment of title. In Mueller v. Sutherland, Tex. Civ. App., 179 S. W. 801, 804, writ refused for want of merit, it is said: "The property rights of owners or lesseees between each other are unaffected by the valid rules and regulations of the Commission respecting the development of an oil field. Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S. W. 2d 935, loc. cit. 944 [87 S. W. 2d 1069], 99 A. L. R. 1107, [101 A. L. R. 1393]; Magnolia Petroleum Co. v. Blankenship, 5 Cir., 85 F. 2d 553. * * *."

Texas courts have followed the great weight of authority in this country by adopting what is generally known as the non-apportionment theory. That theory, in the language of Judge Murrah of the Tenth Circuit in the case of Republic Natural Gas Co. v. Baker, 197 F. 2d 647, 648, is "to the effect that absent an express covenant or supervening valid regulations, the owner of mineral interests under a portion of land subject to an oil and gas lease is entitled to all of the rents and royalties accruing

from the production of oil or gas from that land, even though the lease may cover other tracts." In that case it was held that the spacing and proportion orders of the Corporation Commission did not provide for nor result in unitization, and to hold with appellant Republic would have amounted to compulsory unitization.

In Summers Oil and Gas, Vol. 3, §608, will be found an informative history of judicial decisions on this question. The first Texas case directly facing the apportionment issue as a matter of law only, there being no provision in deeds to construe, was Japhet v. McRae, Tex. Com. App., 276 S. W. 669, 670. In that case the Commission of Appeals approved as correct the following proposition of law: "Where the lessor of land for oil and gas, subsequently to the execution of the lease, but prior to the development of the land and the production of oil or gas under the lease, sells a portion or portions of the land to others, and oil and gas are thereafter produced under the lease from some portion of the leased premises, the royalties therefrom belong to the owner of the particular tract upon which the well is located, and the owner or owners of other portions of the leased premises have no interest therein." The court in this case also uses the following language: "• • • *It seems to us that the only safe rule, and the only one free from much confusion, is one which gives the oil to the man who owns the land upon which the well is located.* • • •." (Emphasis added.)

The following cases are in accord with Japhet v. McRae, supra, to-wit: Hinds v. McCord, Tex. Civ. App., 45

S. W. 2d 442; Mueller v. Sutherland, Tex. Civ. App., 179 S. W. 2d 801, wr. den., w. m.; Hill v. Roberts, Tex. Civ. App., 284 S. W. 246, 249; Bibb v. Nolan, Tex. Civ. App., 6 S. W. 2d 156, wr. ref.; Sheffield v. Hogg, 124 Tex. 290, 77 S. W. 2d 1021, 80 S. W. 2d 741; Harris v. Wood County Cotton Oil Co., Tex. Civ. App., 222 S. W. 2d 331; Garza v. De Montalvo, 147 Tex. 525, 217 S. W. 2d 988.

The case of Nale v. Carroll, Tex. Civ. App., 266 S. W. 2d 519, is in some respects similar to the case at bar. In that case a permit had been granted to drill a well on a .51 acre tract as an exception to Rule 37 of the regulations of the Railroad Commission. The tract was later subdivided into smaller tracts with Nale owning .093 acres, and Longshore-Carroll owning .17 acres, and the remaining tract being owned by parties who did not appeal from the judgment of the trial court. The well was drilled on the Longshore-Carroll tract and Nale brought suit for an apportionment of the royalties from said well on the basis that the square-footage of land owned by him bore to the total square-footage of the one-half acre. Nale also asserted co-ownership of the oil produced from the well and urged that the deed subdividing to him the land did not have the effect of depriving him of such ownership, that the permit was a valuable property right that attached to the drilling unit of the one-half acre, and ran with the land deeded to him, and that Longshore-Carroll had converted his part of the oil and funds derived from its sale to their own use and benefit, and he also alleged a trespass by drainage. In that case all of the written instru-

ments there involved contained no pooling or unitization provisions. In affirming the judgment of the trial court denying the claims of Nale, this court said: "It is well established that there can be no compulsory unitization in Texas, and to yield to the claims of appellants in this case would practically effect unitization."

Appellant in its reply brief makes the following statements: "Appellant does not assert that its leasehold estate in Lots 12 and 13 has been pooled or unitized with the leasehold estate of appellees in Lots 10 and 11. No action on the part of the Commission, nor conveyances between the parties, effecting a forced pooling or unitization of the respective leasehold estates of the parties, is in any way necessary to entitle appellant to the relief requested. Appellant merely contends that the courts of this state in announcing the rule against subdivisions of tracts entitled to only one well have, as a matter of law, recognized and decreed that the subdivisions so made remain a single development and producing unit just as they were prior to such subdivision * * *. Appellant claims no possessory right in Lots 10 and 11 nor any right to operate and produce the oil from the well located within boundaries of Lots 10 and 11. It merely claims the right to prevent confiscation of its oil by being permitted an equitable share of the production of the single well authorized by law to produce the oil from beneath both the leasehold estate owned by appellant and the leasehold estate owned by appellees—and only the right to share in such production after appellees have re-

covered therefrom their entire reasonable and necessary drilling and operating costs."

Appellant in contending that Ryan is entitled to equitable relief makes the following statement in its brief: "Since our Texas conservation laws and rules of the Railroad Commission do not expressly or impliedly require the confiscation of Ryan's oil, those laws and rules are valid, and the permit granted to Pickens and Coffield to drill a well on the .4-acre tract is likewise valid. Likewise, the denial of a permit to Ryan to drill an offset well was justifiable as a reasonably necessary incident of the exercise of the police power to prevent waste by controlling the spacing of wells. Ryan, however, is entitled to demand that it be afforded 'adequate means of protection' against the confiscation of its property 'as a substitute' for the denial of that means of protection which the common law awarded him; i. e., as a substitute for his common-law right to drill an offset well. Since the Railroad Commission lacks jurisdictional power to grant Ryan any substitute relief against the confiscation of its property, both the jurisdiction and the duty to grant an appropriate substitute remedy rests in the courts of this state."

Appellant cites a recent Mississippi case, Hassie Hunt Trust v. Proctor, 215 Miss. 84, 60 So. 2d 551, 556, wherein appellant states that the Mississippi court granted the very type of equitable relief requested here by Ryan. This case however was predicated upon Mississippi statutes which had limited and circumscribed the rule of capture in that state. We quote from the court's opinion in said case

as follows: "The appellants further contend that the appellees are not entitled to participate in the production because the well is located on the 30 acre tract and not on the 10 acre tract in which appellees claim their interest, and no pooling or unitization agreement has been entered into between the parties. In other words the appellants contend that under the rule of capture they are entitled to all of the oil produced from a well on their land. It is true that this court recognized the rule of capture in the case of Merrill Engineering Co. v. Capital National Bank, 192 Miss. 378, 5 So. 2d 666. This case was decided, however, prior to the legislative enactments in this state of conservation laws and the promulgation thereunder of spacing regulations. We have just held in the case of Griffith v. Gulf Refining Co. [215 Miss. 15], 60 So. 2d 518 [61 So. 2d 306], that the rule announced in this case is now limited and circumscribed by these subsequent legislative enactments." It is our view that the above referred to Mississippi case has no application to the case at bar.

The trial court in the case at bar found that the Pickens-Coffield well had drained some oil from outside the boundary lines thereof but that under the evidence it was impossible to ascertain whether such oil was drained from land to the north, south, east or west, nor how much from any direction, and that each of the said four lots 10, 11, 12 and 13, were underlain at all times from the discovery of the Hawkins field up to the time of the trial with practically the same amount of oil under each lot. We think

these findings of the trial court are supported by the evidence.

Appellant earnest contends that it is not seeking a forced unitization but is seeking an equitable substitute remedy in order to prevent its oil being confiscated. Our Supreme Court in an opinion by Justice Critz, in the case of Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. 2d 73, 80, in discussing the effect of the voluntary subdivision rule holds that the right to be protected against confiscation under "Commission" oil and gas rules is not absolutely unconditional or unlimited. We quote from this decision as follows: "It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the Rule of May 29th. Empire Gas & Fuel Co. v. Railroad Commission, Tex. Civ. App., 94 S. W. 2d 1240, writ refused. The right to be protected against 'confiscation' under Commission oil and gas rules is not absolutely unconditional or unlimited. We will not discuss the condition or limitation which the Rule of May 29th has imposed or engrafted on the right to be protected against 'confiscation.' An examination of the order or rule of May 29, 1934, hereinafter referred to as the Rule of May 29th, will show that subdivisions of land, as such, which have or hereafter may come into existence after Rule 37 became effective are not protected at all against confiscation. When Rule 37 and the Rule of May 29th are read together, it is evident that exception permits may be

issued to protect such tracts from waste; but such exception permits cannot be issued to protect such tracts, as such, from confiscation. In this regard, the Rule of May 29th states 'no subdivision of property made subsequent to the adoption of the original spacing rule will be considered in determining whether or not any property is being confiscated within the terms of such spacing rule, and no subdivision of property will be regarded in applying such spacing rule or in determining the matter of confiscation if such subdivision took place subsequent to the promulgation and adoption of the original spacing rule.' To our minds, language could not be made plainer, or more all inclusive. Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S. W. 2d 967, supra."

A permit to drill, granted by the Railroad Commission in administration of conservation laws, can certainly have no higher function in passing title than solemn conveyances. In Tex. Jur., Vol. 3-A, §5, p. 27, it is said that "the conservation statutes and the regulations of the Commission made thereunder have not abolished the ownership of oil in place nor the right of capture without liability to adjoining owners." This is the broad, general base no which must rest judicial construction in related matters. The decisions referred to above have definitely established the principles upon which this case must be grounded.

It is well established that there can be no compulsory unitization in Texas, and to yield to the claims of appellant in this case would practically effect unitization.

Appellant also contends that appellees are judicially estopped to deny that the well was drilled upon and is producing from the entire unit and to deny Ryan who offered to join in drilling said well, to participate in the production therefrom on an equitable basis. Appellees contend, among other things, that appellant and the Railroad Commission in the proceedings before the Commission and the courts in the statutory appeal were fully advised that Pickens and Coffield had consistently refused to make an agreement with appellant pooling Lots 10 and 11 with Lots 12 and 13 but insisted that one well to which the four lots were entitled should be drilled on Lots 10 and 11 and that Pickens and Coffield, in case the well was so drilled, would claim the right to all the oil produced thereby. Lengthy evidence on the estoppel issue, both documentary and parol, was introduced by both appellant and appellees, which we deem unnecessary to detail here. The findings of fact of the trial court which negative the estoppel theory, we think are sufficiently supported by the evidence. The trial court in its conclusions of law also found that there was no basis for the operation of the law of estoppel or show a change of position by any of the parties and the evidence did not indicate that Pickens and Coffield either intended to assert any leasehold rights in Lots 12 and 13 or to relinquish any leasehold rights in Lots 10 and 11 and vest them in Ryan Consolidated. We think the trial court correctly held that appellees were not estopped to claim the oil produced by them.

Having reached the conlcusions above stated we deem it unnecessary to pass upon appellees' contention that Ryan had failed to establish by sufficient proof its ownership of oil and gas leases on Lots 12 and 13.

Finding that the judgment rendered by the trial court is the only judgment that could properly be rendered in this case, and that no reversible error has been presented, appellant's points of error are respectfully overruled, and the judgment of the district court is affirmed.

WM. J. FANNING
Associate Justice

B-19

No. A-4650

In the

SUPREME COURT OF TEXAS

From Wood County, Sixth District

RYAN CONSOLIDATED PETROLEUM CORPORATION,
Petitioner,

v.

W. L. PICKENS, *et al.*,
Respondents.

March 23, 1955

This is a suit brought by Ryan Consolidated Petroleum Corporation, as plaintiff, for equitable relief from the confiscation of oil and gas by Pickens & Coffield, as defendants. The defendants won a take nothing judgment in the trial court which has been affirmed by the Court of Civil Appeals. 266 S. W. 2d 526.

Pickens & Coffield hold an oil and gas lease upon one half and Ryan Consolidated Petroleum Corporation holds an oil and gas lease upon the other half of a tract consisting of four lots in the Hawkins townsite which was subdivided after Rule 37 became applicable. Pickens & Coffield secured a permit and drilled a well upon their one half. The Railroad Commission denied Ryan a permit to drill on its one half of the original tract, and Ryan now

seeks in this suit an equitable share of the oil produced from the entire tract based upon its proportionate ownership.

Pickens & Coffield claim that they cannot be forced to pool their lease with Ryan. Ryan claims that this contention puts the proposition exactly backwards. The true situation, according to Ryan, is that Rule 37 prevents the subdivision of a tract for oil and gas production purposes, and, rather than this being a forced pooling situation, Rule 37 prevents separate tracts from coming into existence, leaving the tract entire for oil and gas production purposes. Under this contention the land is frozen as one tract for production purposes as of the time Rule 37 attaches, but the parties are free to convey subdivisions of it as they will.

Pickens & Coffield contend that if the tract of land be treated as a unit for production for oil and gas and be entitled to one well only, the owner of the particular spot upon which the well is located has the right to the entire production from the whole unsubdivided tract. The location of the well is to be determined by the Railroad Commission without regard to ownership and at a point which will result in the most production and the least waste with due regard to the systematic development of the field. In their brief they state:

> "The net effect of Railroad Commission v. Miller, 165 S. W. 2d 504, is that the result of such a subdivision is that neither subdivided parcel as such is protected against confiscation; that the Commission can

> locate the well that was theretofore justified on the tract as it existed before subdivision at the best point thereon; and that the owner of the leasehold estate in the subdivision on which the well is granted will get all the oil and the owner of the other subdivision none."

Ryan replies that as between the individual owners of the subdivision of the tract, this makes the well location a matter of pure chance which no one can foresee. Ryan points out that under this theory had the best location been determined to be twenty five feet east of where it is, the situation of the parties to this suit would have been completely reversed, and "The Railroad Commission has no power to take property from one person and give it to another by the mere location of a well site."

Pickens & Coffield contend also that as between the parties the first person to secure an oil and gas lease upon a subdivision thereby obtains a preference right to drill for the entire unsubdivided tract. Ryan contends that since this permit was granted to protect all four lots against confiscation, Pickens & Coffield should not be permitted to use the permit so as to confiscate the oil under two of the lots. Obviously we cannot require the Railroad Commission to choose arbitrarily between rival applicants and determine as a matter of grace or favor which owner can produce for the entire tract. Such a legal result would be utterly foreign to our form of government. The case is not, however, as complicated as the parties would make it and can be worked out upon the duties and obligations imposed and the rights arising from the various conveyances.

With this preliminary statement, we will now outline in detail the facts giving rise to the dispute.

Lots 10, 11, 12, and 13 in the Hawkins townsite were each 30 x 113 feet and altogether contained 4/10ths of an acre of land. On October 18th all of these lots belonged to the heirs of H. C. Holmes and wife, and under Rule 37 must thereafter be considered as one tract for drilling and development purposes. On October 18th the adult heirs and on November 9th the guardian of the two minor heirs executed an oil and gas lease covering the four lots to Smith & Morrison. Mack Holmes, an heir who owned a 1/6th interest, did not join.

Subsequently a controversy developed between Smith & Morrison and the Holmes heirs with the Holmes heirs contending that they had included lots 12 and 13 in the lease by mistake. In settlement of this controversy Smith & Morrison on the 13th day of December 1940 released to the Holmes heirs their interest in that portion of the oil and gas lease covering lots 12 and 13. Subsequently on the 26th day of December 1940 Smith & Morrison conveyed the lease in so far as it covered lots 10 and 11 to Coffield and he in turn conveyed the lease in so far as it covered lot 11 to Pickens.

On December 26th the Holmes heirs leased 5/6ths of lots 12 and 13 to Ryan. Thus we start with a tract under one ownership in the Holmes heirs and under one oil and gas lease in Smith & Morrison. Under Rule 37 it would have been far better for it to have remained so, and it is clear

that the law requires that as between the parties they be relegated to such rights to drilling permits as existed prior to the subdivision of the minerals. Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S. W. 2d 967; Magnolia Petroleum Co. v. Railroad Commission, 141 Tex. 96, 170 S. W. 2d 189; Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. 2d 73; Holcomb v. Atlantic Refining Co., CCA 1943, error ref. w.o.m., 172 S. W. 2d 523; Railroad Commission v. Miller, CCA 1942, no writ history, 165 S. W. 2d 504; Railroad Commission v. Magnolia Petroleum Co., 125 S. W. 2d 398 (CCA 1939, error ref.); Humble Oil & Refining Co. v. Lasseter, 120 S. W. 2d 541 (CCA 1938, error dism.).

At that time the situation was that the Holmes heirs owned the fee of the entire tract with 5/6ths of lots 10 and 11 under oil and gas lease to Smith & Morrison. Had Smith & Morrison at that time applied to the Railroad Commission for a permit, the Holmes Heirs could not have opposed their application. To have done so would have been in derogation of their grant and of the terms of their lease. Also, at that time, had they both applied for a permit, and had the Railroad Commission allowed one well to the tract, it should, as between the parties, have gone to Smith & Morrison. It is true that "the proper location of the well was a matter within the exclusive jurisdiction of the Commission, under its delegated authority to administer the conservation laws of the state, untrammeled by any agreement, whether express, or implied, by the owners," Railroad Commission v. Miller, 165 S. W. 2d 504 (CCA 1942,

no writ history), but it is also true that as between the parties the Holmes Heirs had placed in Smith & Morrison the right and the obligation to drill, and, as it turned out, this coincided with the Railroad Commission's determination of the best location for the well.

But Smith & Morrison had by release conveyed to the Holmes Heirs five sixths of seven eighths of the minerals in lots 12 and 13. Since both parties agree that subdivision conveyances generally are valid and binding as between the parties and since we find no suggestion in any of the cases that Rule 37 invalidated this conveyance, Smith & Morrison and their assignees are required to honor it. If the Smith & Morrison release were invalidated by Rule 37, it might be argued that so would be the other half of that transaction which was the Holmes heirs ratification of the lease of lots 10 and 11 to Smith & Morrison. Pickens & Coffield do not attack the validity of the original subdivision.

Had the Railroad Commission at that time decided that the minerals for the entire tract should be produced through one well (and in view of the general spacing pattern for the Hawkins field and with the entire tract being four tenths of an acre, it is difficult to see how it could reach any other conclusion), the relationship of the parties would then have been about this: Smith & Morrison would have been entitled to the production attributable to five sixths of lots 10 and 11 less whatever royalty free and clear of production costs (to the Holmes heirs and their assignees) upon that production they were obligated to pay.

In addition, the Holmes heirs would have been entitled to the production attributable to lots 12 and 13 less their share of the production costs. If the Railroad Commission should determine that one well would produce the entire tract, then the Holmes heirs had no right to drill since they had by their conveyance and as between themselves given Smith & Morrison a preference right to drill and they could not create such a right in Ryan nor require Ryan to drill in derogation of that preference right.

So the Holmes heirs undoubtedly did have an interest in the minerals in lots 12 and 13 which they could convey. A complicating factor is that Pickens & Coffield purchased from Mack Holmes his one sixth (1/6) mineral fee interest in all four lots which they hold in addition to their lease upon lots 10 and 11.

Pickens and Coffield contend that there is no proof that the five sixth (5/6) of seven eighths (7/8) of the minerals under lots 12 and 13 conveyed by the release are being produced through their well. They say:

> "In the light of the testimony of the witness Speller and finding of the trial court and Court of Civil Appeals in accordance therewith (Tr. 84), that it is impossible to tell whether the drainage to the well on Lots 10 and 11 will come from the north, east, south or west, it must be held that there was no evidence that respondents will drain any oil from Lots 12 and 13 and none that their production of oil will be more than it would have been if all the oil under Lots 12 and 13 has been and will be drained by other wells."

We hold that the history of the permit proceedings before the Railroad Commission and consequent litigation

judicially estops Pickens & Coffield from contending that their well is not producing oil from the entire tract of four lots.

Coffield first applied for a permit to drill lot 10 and Pickens applied for a permit to drill lot 11. Both were denied February 28, 1941. Next Ryan applied for a permit to drill one well on lots 12 and 13 and on April 7, 1941, this was denied. Pickens again applied for a permit to drill lot 11 and this was again denied on August 22, 1941.

On November 14, 1945, Pickens & Coffield filed an application to drill one well on lots 10 and 11. The notice for this application stated:

> "The application involves, and is intended to involve the oil and gas leasehold rights, permit rights, and development rights, past, present and future, in Lots 10 and 11, Block 23, as well as Lots 12 and 13, Block 23, and particularly as those rights existed on and prior to October 18, 1940."

On November 16, 1945, Ryan applied for a permit to drill a well on lots 12 and 13. The notice contained the following paragraph:

> "The application involves and is intended to involve the oil and gas leasehold rights, permit rights, and development rights, past, present and future, in Lots 12 and 13, Block 22, as well as Lots 10 and 11, Block 23 Hawkins townsite."

On December 21, 1945, both applications were denied. On February 26, 1946, rehearings were granted on both applications. A consolidated rehearing was held on March 12,

1946. On April 3, 1946, the Commission granted the Pickens & Coffield application in the following language:

> "NOW, THEREFORE, IT IS ORDERED that the application of Pickens & Coffield, together with the application of Ryan Consolidated Petroleum Corporation for a permit to drill one well only on the four lots, Nos. 10, 11, 12 and 13, Block 23, said lots being owned jointly as follows: Nos. 10 and 11, by Pickens & Coffield, and Nos. 12 and 13 by Ryan Consolidated Petroleum Corporation, and the well being requested as well No. 1, Heirs of H. C. Holmes, et ux. Lots 10, 11, 12 and 13, Block 23, Hawkins townsite, Wood County, Texas, as shown by plat submitted, is hereby approved and since these four lots were originally one tract, it is the intention of the Commission to grant one well on the four lots and let both applicants share equally in the benefits of the one well the location of same being as follows:
>
> "In the exact center of Lots 10, 11, 12 and 13, Block 23, Hawkins Townsite, and being midway between the north and south lines of said tract of four lots, and on the line between Lots 11 and 12."

On the same day the Ryan application was denied "in as much as applicant's interest is being taken care of in the well being granted on the four lots 10, 11, 12 and 13 and being located half on the Ryan Consolidated property and half on the Pickens and Coffield property, it being the intention of the Commission to grant only one well on these four lots and have the two applicants share equally in this one well, * * *."

Subsequently, rehearings were granted by the Commission on both applications. The notice of rehearing on the

Pickens & Coffield application contained at their request the following paragraph:

> "The application involves, and is intended to involve the oil and gas leasehold rights, and development rights, past, present and future, in Lots 10 and 11, Block 23, as well as Lots 12 and 13, Block 23, and particularly as those rights existed on and prior to October 18, 1940."

On July 3, 1946 the Commission granted Pickens & Coffield application for "a permit to drill well No. 1, Heirs of H. C. Holmes et ux, Lots 10, 11, 12 & 13." This is the permit under which the well was drilled. On July 5, 1946 the Commission denied the Ryan application. On August 7, 1946 Pickens & Coffield mutually conveyed to each other so that thereafter they each owned a one-half (½) interest in lease of five sixths (5/6) of lots 10 and 11.

On November 21, 1946 Ryan perfected an appeal to the District Court of Travis County by filing a Rule 37 suit attacking the Pickens & Coffield permit and the Commission's action in refusing their own application. The trial court judgment in that Rule 37 case denied both permits. In his conclusion No. 4 the trial court said:

> "Said four lots being capable of full development as a whole or entire tract for oil and gas purposes by one well, and being entitled to at least one well, but neither said Lots Nos. 10 and 11, considered as a unit, nor said Lots Nos. 12 and 13, considered as a unit, being capable of separate development in compliance with the rules and regulations of the Railroad Commission applicable to said field, the owners of leases in said four lots should be relegated to the situation as it ex-

> isted prior to the subdivision of said four-lot area into separate lease tracts, which was a joint right to drill for the benefit of the owners of the oil, gas and other minerals in and under all four lots and the owners thereof have not been and are not so relegated until their separate lease tracts have been reunited as they were prior to leasing, either by pooling or by application for the joint development of the four lots for the use and benefit of the owners of the said four lots, neither of which has been done. The Railroad Commission, therefore, either should have denied both applications or withheld action thereon until such had been done, and its failure so to do is arbitrary, capricious, improper and unjust in that the granting to one and denying to the other of the applicants a permit to drill constitutes an attempt by the Commission to decide and declare priority of rights when no priority of rights exists."

Both appealed. The Court of Civil Appeals reversed the trial court and rendered judgment affirming the Commission in granting the Pickens & Coffield permit and in denying the Ryan permit. 219 S. W. 2d 150.

The brief of Pickens & Coffield in that case is in evidence in this case. In it they make it clear that they sought judicial relief on the grounds that their well would produce oil from the four lots. Their Points One and Three in their brief attacking the trial court's judgment were:

> "Point One. The court erred in cancelling the permit granted Appellants Pickens and Coffield because the undisputed evidence showed and the Court found that Lots 10, 11, 12 and 13 involved herein were entitled to at least one well to prevent confiscation of property; that Appellants Pickens and Coffield own the entire ⅞ leasehold estate in Lots 10 and 11; the

evidence did not show and the Court did not find that there was no substantial evidence to support the location of this well made by the Railroad Commission in relation to the necessities of the four lots as they existed before subdivision, but on the contrary, the evidence showed that there was substantial evidence that this location was the best one on any part of the four lots from the standpoint of conservation, securing production of the most oil and leaving the least oil in the ground."

"Point Three. Since the evidence showed that the lease of Pickens and Coffield on Lots 10 and 11 was executed and effective as of October 18, 1940, and that the Ryan Company's lease upon Lots 12 and 13 was executed subsequent thereto by the same lessors, and since the former lease expressly granted unto appellants the exclusive right to drill and explore for oil upon the property therein described, and contained a general warranty of title, and since the four lots were entitled to at least one well which had been granted to said appellants under an exception to Rule 37, to prevent the confiscation of their property, it inevitably follows that the District Court erred in holding that said appellants did not have a preferential right to drill the first well on any part of said four lots."

In their argument under Point One they stated:

"* * * The undisputed evidence was, and the Court found, that the oil and gas beneath the said four lots had been and was being drained by other wells in the area, and that said four lots were entitled to at least one well."

In their argument under Point Three they stated:

"* * * So it must be and is conceded that the four lots, considered as one body of land, were entitled to one well to prevent confiscation of property."

Their Point Five was:

> "The District Court erred in finding that 'one well located at any drilling site on said four lots would adequately protect the four lots against drainage'."

In their argument under Point Five they stated:

> "As heretofore shown by statements from the record all of the petroleum engineers agreed that one well located at any point on the four lots would produce the equivalent of all the recoverable oil thereunder and more. * * *."

In their argument under Point 6 they stated:

> "An examination of these transcripts will show that these Appellants, by their attorneys, stated that they were asking the Railroad Commission to locate the well the four lots were entitled to on some part of Lots 10 and 11 first, because they were entitled to such location as a preference right by reason of their having secured the first lease, and second, because the best location for a well on the four lots, considered together, from the standpoint of conservation, was on some part of Lots 10 and 11, and specifically at the point selected by the Railroad Commission."

They argued further:

> "It is equally clear, however, that the application of Pickens and Coffield invoked the jurisdiction of the Railroad Commission, in case it rejected the claim of preferential right, to decide at what point on the four lots the one well should be drilled and if it found that the best point was on Lot 10 or on Lot 11 to grant them a permit to drill it. Also that the application of the Ryan Company invoked the jurisdiction of the Railroad Commission to decide the best point on Lots 10, 11, 12 and 13 to drill the one well, and if the Railroad Commission rejected Appellants' claim of

preference and decided the best point was on any part of Lots 12 and 13, to grant them a permit to drill the well."

In their argument under Point Eight they stated:

"The very fact that the application of Appellants Pickens and Coffield asked that the Railroad Commission consider the four lots as one body of land and determine the best location thereon for the drilling of a well gave adequate notice to all and especially to the Ryan Company and to Intervenor Humble Oil & Refining Company that it was contemplated that the location of the well should be selected by the Commission."

In their argument under Point Seven they stated:

"As heretofore shown in this brief the undisputed evidence was that the best point on the four lots considered as one body of land for the drilling of the one well it was entitled to was the point selected by the Railroad Commission, and therefore the District Court erred in finding that three other locations were equally supported by substantial evidence."

The Court of Civil Appeals sustained the contention of Pickens & Coffield (219 S. W. 2d 150). The Court said:

"The combined area as it existed in October 1940 was entitled to one well to prevent confiscation as an exception based on a finding by the Railroad Commission that the tract as it originally existed needs a well for such purpose. This was held by the trial court.

"The order of the Commission finds reasonable support in the record both as to the need for a well and the location by substantial evidence."

After emphasizing that the Pickens & Coffield application was "intended to involve the oil and gas leasehold rights, permit rights, and development rights, past, present, and future," in all four lots, the Court said:

> "At this hearing the Commission entered its order granting a permit to appellants to drill their well No. 1 at a place selected by them, and on a spot suggested by witness Hudnall as the best location considering the four lots as a whole. This location finds reasonable support by substantial evidence, and there was no substantial evidence that the location of the well was not as good as any other location on the four lots, if not the best. * * *."

The Court also said:

> "This judgment is without prejudice to the assertion by Ryan or other interested parties of any right which they may have in or to the oil or gas produced or to be produced from the well drilled by Pickens and Coffield on the lots in suit."

The basis of Rule 37 providing well spacing as a conservation measure is the assumption that under the spacing pattern adopted for a given field each well as a matter of fact will produce the recoverable oil and gas in the space allotted to that well. When an applicant for a permit states in his application the area upon which he seeks to justify the issuance of the permit, he is stating a fact that in his opinion the well applied for will produce the recoverable oil and gas from the designated area.

So having sought a permit to produce from all four lots and having obtained judicial relief sustaining their permit

and denying Ryan's permit on the grounds that the one well would produce all of the oil and gas from the four lots, Pickens & Coffield are judicially estopped to deny that their well is in fact producing from all four lots.

They argue in their brief that they included all four lots because:

> "* * * consideration of the four lots as they existed before subdivision was requested as required by the Miller case, supra, and that Respondents had one hearing postponed because the notices thereof did not show this fact. In this connection, we refer to the decisions in Humble Co. v. Potter, 143 S. W. 2d 135, 136; R. R. Com. v. Miller, 165 S. W. 2d 504, and Gulf Land Co. v. Atlantic, 131 S. W. 2d 73; to show that it was necessary that notices of this feature of the application be given in order that interested parties might know the nature thereof. The Miller case required the jurisdiction of the Commission to be properly invoked in such cases and clearly it would not be properly invoked if the notices issued did not show that the application was made in relation to the necessities of the tract as it originally existed."

This amounts to a statement that they could not get their permit without including the four lots. This makes the judicial estoppel more binding.

It being established that, first, the well is allocated to and is in fact producing from a tract consisting of all four lots, that, second, Pickens & Coffield own a lease upon only one half (½) of that tract plus a one-sixth (1/6) mineral interest in the whole tract, and that, third, by release their predecessor in title had conveyed five sixths (5/6) of seven

eighths (7/8) of the minerals in the other half to the Holmes heirs, it becomes apparent that if this release is to mean anything at all, Pickens & Coffield must be required to account for the minerals they are producing from the one half of the tract (Lots 12 and 13) which their predecessor in title conveyed to the Holmes heirs less that portion they purchased from Mack Holmes. Otherwise the Smith & Morrison release was in fact just what Pickens & Coffield say Ryan bought—a dead horse. This "dead horse" contention is simply another way of saying that Rule 37 invalidates conveyances made after it attaches, a legal proposition which both parties agree to be wrong. Magnolia Petroleum Co. v. Railroad Commission, 141 Tex. 96, 170 S. W. 2d 189; Nash v. Shell Pet. Co., CCA 1938, error dism., 120 S. W. 2d 522. Pickens & Coffield make it clear throughout their brief that in their opinion a subdivision contrary to Rule 37 is valid and binding as between the parties. They seek to take all real meaning out of it, however, by denying to both halves of the subdivision the right to participate in the oil recovered.

The law of capture has no application to such a situation because drainage of adjoining property under the law of capture was rationalized with ownership in place in Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566, on the basis of equal rights to drill.

Where equal rights to drill are denied, as under the facts of this case, the law of capture is no defense. Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S. W. 2d 558. But

this is just another consequence of the fact that the parties are relegated to the situation existing before subdivision.

Pickens & Coffield attack the Ryan title on the grounds that the failure to drill and produce oil from lots 12 and 13 has worked a forfeiture in the absence of the payment of an annual rental. Under the facts of this case there can be no termination based upon failure to drill lots 12 and 13, for the Holmes heirs had by their own act subordinated the right to drill lots 12 and 13 to a preference right to drill lots 10 and 11, and where it was determined that there was a right to drill only one well on the entire tract, they cannot assert a termination. Because the mineral ownership of lots 12 and 13 is further complicated by oil payments in addition to the complicated title outlined above, the case is remanded to the trial court for an accounting and further proceedings in accordance with this opinion. Questions of limitation cannot be determined until the accounting is worked out in detail as Ryan would not be entitled to any money until all expenses of drilling and equipping the well and the lease have been recovered. The judgments of the Court of Civil Appeals and the trial court are reversed and the case is remanded. Costs are taxed against respondent.

WILL WILSON
Associate Justice

Associate Justices Griffin, Calvert, Smith, and Walker dissenting.

B-37

No. A-4650

In the

SUPREME COURT OF TEXAS

From Wood County, Sixth District

RYAN CONSOLIDATED PETROLEUM CORPORATION,
Petitioner,

v.

W. L. PICKENS, *et al.*,
Respondents.

DISSENTING OPINION

March 23, 1955

I respectfully dissent. I can conceive of no reason, legal or equitable, why Ryan should be permitted to participate in the oil produced from the well drilled by Pickens and Coffield pursuant to a permit granted to them by the Railroad Commission.

The permit was granted for the purpose of preventing confiscation and physical waste. On the question as to location of the well, Pickens and Coffield's expert witness testified that in order to best protect the drilling pattern of the field, to prevent waste, and from the viewpoint of maximum drainage efficiency and maximum production from the well throughout its future life, the well, in his opinion,

should be located on Lot 11 (Pickens and Coffield lot). Ryan's geological expert, Mr. Griffin, testified that the best location for the well would be on Lot 13 owned by Ryan. The Commission determined the issue adversely to the contention of Ryan.

Petitioner asserts that it has exhausted all legal remedies, and the case is one for equitable relief. It requests that the Court exercise its equitable powers to prevent confiscation of the property of one person to the unjust enrichment of another, where the injured party has "no remedy by self-help, nor any remedy at law, to prevent such confiscation." Petitioner further contends that it owns the leasehold title to the oil and gas underlying Lots 12 and 13, which constitutes a property interest subject to judicial protection against confiscation. In other words, as lessee, it is entitled to a fair chance to recover the oil or gas in or under Lots 12 and 13. It is argued by petitioner that unless the Court grants the relief sought in this case, its property will be confiscated.

Petitioner says in its application for writ of error that it wants this Court to hold that on October 18, 1940 (the date of the subdivision) and at all times subsequent to that date, the four lots have been and are now a single drilling and producing unit. It contends that prior to October 18, 1940, the Holmes heirs, the owners of the four lots at that time, had the right to drill a well on the four lots as a single drilling and producing unit, and that, collectively, petitioner and respondents have succeeded to that right. This,

on the theory that where tracts have been segregated in violation of the subdivision rule, the parties are "relegated to their rights as they existed prior to" the subdivision. I cannot agree with any of the theories advanced by petitioner. To hold with petitioner would be tantamount to forced pooling or unitization of two separate and distinct and severed tracts of land.

The Holmes heirs, in their lease to Smith and Morrison, reserved only 1/8th of the oil. They conveyed a determinable fee to Smith and Morrison of 7/8ths of the oil in and under Lots 10 and 11. Subsequently, they executed the lease to petitioner. To follow the theory of petitioner would be to hold that although the Holmes heirs reserved only 1/8th, the subsequent lessee, Ryan, of Lots 12 and 13 has, in addition, the right to one-half of the working interest part of the oil produced from the well drilled on Lots 10 and 11 after the expense of drilling had been recovered. The lease owned by Pickens and Coffield on Lots 10 and 11 grants to them "the exclusive right to * * * produce, store and remove therefrom oil, gas, casinghead gas and all petroleum products." The leases vested in the original lessees, Smith and Morrison, and in Pickens and Coffield, their successors in title, a determinable fee estate in the oil and gas under Lots 10 and 11, and the exclusive right to drill a well thereon and to produce and take all the oil and gas that was produced as a result of proper drilling and operation of the well. See 31 Tex. Jur. 24-27. The four lots involved were entitled to one well. When Pickens and Coffield secured the leasehold rights in Lots 10 and 11 they

were charged by law with notice of the fact that they could not drill a well thereon except to prevent waste, or by reason of the preference right as the first lessee of Lots 10 and 11 of the four lots involved, or by reason of a finding by the Railroad Commission that the best location for the one well to prevent confiscation was on one of their lots.

When Ryan secured 7/8ths of the leasehold rights in Lots 12 and 13, it was charged with notice of the fact that the four lots might not be entitled to but one well to prevent confiscation. It was charged with notice that the Holmes heirs had executed a lease on Lots 10 and 11 to Smith and Morrison (assigned to Pickens and Coffield) providing for the exclusive right to drill a well thereon and containing a general warranty of title, and further that if the Railroad Commission found that the one well, to which the four lots were entitled to prevent confiscation, should be drilled on Lots 10 or 11, no well could be drilled on Lot 12 or on Lot 13, *except to prevent waste.* The permit granted to Pickens and Coffield was to prevent confiscation and waste. At the time the Holmes heirs executed leases covering Lots 10 and 11 to Smith and Morrison, and later executed leases to Ryan covering Lots 12 and 13, it was not known whether the Railroad Commission would decide that two wells were necessary to prevent waste.

The Railroad Commission in this case has found that only one well should be allowed and that the best location for the well in the interest of uniform drilling pattern is upon Pickens and Coffield's lot. The order of the Railroad Commission was based upon substantial evidence.

In the case of Gulf Land Company v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. 2d 73, it was held that the Railroad Commission cannot grant a well permit on a tract subdivided in derogation of Rule 37 to prevent confiscation, but can grant permit for a well on such tract to prevent waste. The Railroad Commission, after hearing, denied the application of Ryan for a permit to drill a well on either Lot 12 or 13. Since the Commission determined that only one well could be drilled on the four lots and since the Holmes heirs conveyed the leasehold interest to Smith and Morrison covering Lots 10 and 11 with warranty of title prior to the conveyance to Ryan, I am of the opinion that as between the Holmes heirs and Pickens and Coffield, the latter had the right to drill the well if they could get a permit from the Railroad Commission to locate it on their lots. This conclusion applies with equal force to Ryan, the lessee of Lots 12 and 13, because it has been shown by the record in this case that Ryan had actual and constructive notice of all the rights of Pickens and Coffield under the former lease when it acquired the lease covering Lots 12 and 13 from the Holmes heirs. See Gulf Land Company v. Atlantic Refining Co., supra.

On the question of actual and constructive notice to Ryan, the trial court made findings of fact in favor of Pickens and Coffield's contention that Ryan did have actual and constructive notice of the rights of Pickens and Coffield under the prior lease. The Court of Civil Appeals has approved such findings. 266 S. W. 2d 526.

I wish to call attention to the undisputed evidence that Ryan purchased its lease without having had any dealings of any kind with either of the respondents, and with full knowledge of the true status of the title. W. W. Harris, who represented the Holmes heirs, testified:

> "Q. At the time you talked to him about it state whether or not you apprised him of the true status of that title with respect to the execution of the first lease and the taking of these two lots out of the lease and the settlement and so forth?
>
> "A. I told him the status of the title, I told him all about the controversy with Smith and Morrison. I told him about the settlement. I told him that he was buying a subdivided tract. I told him also that in so far as title to the lots are concerned I figured that the Holmes heirs owned the lot, both of the lots, 12 and 13.
>
> "Q. Yes.
>
> "A. I told him that there were two other contiguous lots and Mr. Hootkins understood all about that and knew the whole transaction.
>
> "Q. And did you tell him anything about the prior lease and that he might not be able to drill on these two lots because of the prior lease if the four lots were only entitled to one well?
>
> "A. That was discussed.
>
> "Q. What did Hootkins say about that?
>
> "A. We discussed the possibility of a well and the possibility of two wells. And I think the possibility of four wells was even discussed. My best recollection is that I expressed the personal opinion that I was doubtful whether there would ever be more than one well on those four lots.

"Q. And what did Hootkins say to that?

"A. Hootkins said in effect that we will just have to take a chance on it."

The witness, W. W. Harris, also testified:

"A. I told them the whole story. I was surprised when it was sold. As Lowell Brown testified, he offered it to many people, and Hootkins was the only man that would buy it for the reason that it was a subdivision. The others refused, but Mr. Hootkins took the chance on it."

The Court made a finding of fact, as follows:

"In the negotiation between the parties leading up to the purchase of the plaintiff's leases, the Holmes heirs were represented by W. W. Harris, an Attorney of the Quitman Bar, while the plaintiff was represented by Semour Hootkins, Vice-President and General Manager of plaintiff corporation, and Zellner Eldridge, attorney for plaintiff corporation, each of whom was authorized to represent plaintiff in said negotiations and purchase.

"Prior to the consummation of the purchase of the adult Holmes heirs lease, as well as the minors' lease, and said W. W. Harris, who represented the Holmes heirs also in settling the threatened controversy between them and Smith and Morrison in the original leases informed the plaintiff's vice president and General Manager and its Attorney fully as to the execution of the prior leases upon the four lots and all other matters with respect to the Holmes heirs; title thereto, and the contention of the Holmes heirs with respect to a claimed mutual mistake of the parties in including Lots 12 and 13 in said prior leases, and the nature of the settlement made wherein the original lessees Smith and Morrison agreed to release their lease as to Lots 12 and 13, in consideration of a

validation of their original lease as to Lots 10 and 11, effective as of the date of the original leases; and the said Harris informed said plaintiff's Vice President and General Manager and its attorney that while the Holmes heirs were willing to execute a lease upon lots 12 and 13, he had some doubt as to whether or not the plaintiff might drill a well thereon because of the subdivision question of a prior lease upon Lots 10 and 11, and that the plaintiff's Vice President Hootkins said that 'we will just take a chance on it.' Thereafter the plaintiff consummated its lease purchase on Lots 12 and 13, one from the adult Holmes heirs and from the guardian of the minor heirs, on the date hereinabove stated.

"Prior to the purchase by plaintiff of the leases on Lots 12 and 13 in the manner aforesaid, and after the settlement agreement with Smith and Morrison, the Holmes heirs sought to sell a lease to Lots 12 and 13 to several other different parties, but none except the plaintiff would purchase a lease thereon because of the subdivision question and the existence of a prior lease on Lots 10 and 11."

Petitioner's contention is inconsistent with the law of capture. It contends, and the majority holds, that the law of capture has no application in this case. With this I cannot agree. The basis for its theory that the rule or law of capture does not apply is that such rule is no longer unrestricted in Texas because of the promulgation of the conservation laws. The petitioner cites the case of Corzelius v. Harrell, 143 Tex. 509, 186 S. W. 2d 961, wherein the court refers to the rule of ownership of oil and gas in place and the rule of capture and concludes that both rules are subject to regulation under the police power of the state.

The well settled rule of capture in this state has not been modified by the adoption and enforcement of Rule 37 or any other rule by the Railroad Commission. The rule of capture is simply this—that the owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though part of such oil or gas may have migrated from adjoining lands. The Railroad Commission is without power from the Legislature or by decision of this Court to do anything more than declare illegal the drilling of wells which are prohibited by Rule 37. The Railroad Commission cannot change the law of Texas. The Legislature of this State has heretofore conferred broad, extensive and exclusive regulatory powers upon the Railroad Commission of Texas in the regulation of the oil industry of this State, but the Commission has not been given the power to determine property rights as between litigants. The courts, whether sitting as courts of law or equity, determine such matters in accordance with existing laws of Texas.

Petitioner insists that the Mississippi case, Hassie Hunt Trust v. Proctor, 60 So. 2d 551, is directly in point. An examination of that case, as well as the case of Griffith v. Gulf Refining Co., 60 So. 2d 518, convinces me that the situation in Mississippi is entirely different from that in Texas. The case of Merrill Engineering Co. v. Capital National Bank, 192 Miss. 378, 5 So. 2d 666, was decided by the Supreme Court of Mississippi on January 26, 1942. That case involved the same question as we have here, and the Court recognized the rule of capture. However, the case

was decided prior to legislative enactments in the State of Mississippi, which had the effect of limiting and circumscribing the rule of capture. When the Griffith and Hassie Hunt Trust cases were decided in 1942, the Legislature of that State had prior thereto enacted Chapter 117, Laws of 1932, Code 1942, Sec. 6132, et seq. Paragraph (b), Section 6140, Code 1942, which made it "the duty of the State Oil and Gas Board to prorate and regulate the gas well production from each common source of supply 'for the protection of public and private interests, *and to adjust the correlative rights and opportunities of each owner of gas in a common source of supply to produce, use or sell such gas*'." (Emphasis added.)

As said in the Griffith case, supra: "The above statutes were forerunners of Chapter 256, Laws of 1948, and amendments thereto, Code 1942, Sec. 6132-01, et seq. It will be seen that the same general idea permeates the declaration of public policy in Section 1 of said Chapter as follows: "to protect the public and private interests against the evils of waste in the production and utilization of oil and gas, by prohibiting waste as herein defined '*to safeguard, protect and enforce the co-equal and correlative rights of owners in a common source or pool of oil and gas to the end that each such owner in a common pool or source of supply of oil and gas may obtain his just and equitable share of production therefrom;* * * *'." (Emphasis added.) Section 10, Chapter 256 of the Laws of 1948, contains paragraph (b), " 'The Board shall in all instances where a unit has been formed out of land or areas of more than one

ownership, require the operator when so requested by an owner, to deliver to such owner or his assigns his proportionate share of the production from the well common to such drilling unit, provided, however, that such owner receiving same shall provide at his own expense proper receptacles for the receipt or storage, of such oil, gas or distillate'."

The Griffith case expressly says that the question involved must be viewed in the light of these statutes. Having reach such conclusion, the court said: "We must at once brush aside such cases as Japhet v. McRae, Tex. Com. App., 276 S. W. 669 * * * and Bruce v. Ohio Oil Co., 10 Cir. 169 F. 2d 709, 713, which deal with common law principles of unrestricted capture." I construe the holdings in both the Griffiths and Hassie Hunt Trust cases to mean that, absent the statutes, the court would have adhered to the law as announced in the case of Merrill Engineering Co. v. Capital National Bank, supra. It would not have brushed aside the holding of our Court in the Japhet case. The Legislature of Texas has not seen fit to enact legislation which would authorize the Railroad Commission to adopt and promulgate rules which would have the effect of rendering ineffective the rule of capture recognized in all of the decisions in this state. As was said in the case of Gulf Land Co. v. Atlantic, supra: "said subdivided tracts as such are not protected at all against confiscation." Since the leases owned by Pickens and Coffield vested a determinable fee estate in the oil and gas under Lots 10 and 11, and since they had the exclusive right to

drill a well thereon and to produce and take all the oil and gas that was produced as a result of proper drilling operations, and since the conservation statutes and the regulations of the Commission have not abolished the ownership of oil in place nor the right of capture, this Court should uphold the vested right of respondents to produce, store and remove from said lots through the well located on Lot 11, all the oil, gas, casinghead gas and other petroleum products, and this without liability to the petitioner, Ryan, the owner of the leasehold rights under their lease covering Lots 12 and 13. The rule applicable to the case at bar is well stated in 31A Tex. Jur., Sec. 5, pp. 24-27, as follows:

> "• • • In some states, the law looks to the fugaciousness of oil and gas in place and considers that they belong to no one until captured and confined. But this theory does not find approval in Texas. Here oil and gas in place are by the established rules of property a part of the realty or corpus of the land, and subject to ownership, severance, conveyance, lease and taxation as such. Being interests in land they are not subject to parol sale, but have the protection of the statute of frauds, the statutes regulating conveyances and mortgages of real estate, and the statutes requiring the recording of instruments affecting title to or liens on land. They are realty within statutes relating to venue. When oil or gas is removed from the soil it becomes personalty. The conservation statutes and the regulations of the Commission made thereunder have not abolished the ownership of oil in place nor the right of capture without liability to adjoining owners."

The courts of Texas have consistently held that the rule of capture is still in force in this State. It has become a vested property right. As said in the case of Brown v. Humble, 83 S. W. 2d 935: "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right." In the case of Japhet v. McRae, Tex. Com. App., 276 S. W. 669, Japhet made the following contention:

> "Where the lessor of land for oil and gas, subsequently to the execution of the lease, but prior to the development of the land and the production of oil or gas under the lease, sells a portion or portions of the land to others, and oil and gas are thereafter produced under the lease from some portion of the leased premises, the royalties therefrom belong to the owner of the particular tract upon which the well is located, and the owner or owners of other portions of the leased premises have no interest therein."

In affirming the trial court's judgment which upheld such contention, the Court said, in part:

> "* * * As our Supreme Court has held, oil is fugitive in its nature, and ordinarily should belong to him who captures it and brings it to the surface. The quest for it involves a tremendous expense and a vast element of chance. In spite of the scientific knowledge of the geologists, the industry still partakes largely of a gamble. It seems to us that the only safe rule, and the only one free from much confusion, is the one which gives the oil to the man who owns the land upon which the well is located. * * *."

Petitioner denies that it seeks by this suit for equitable relief any of the title owned by respondents, either as the result of forced pooling or otherwise. But, in my opinion, the effect of its contention is to compel forced unitization in spite of the fact that the Legislature has not authorized the Railroad Commission to adopt rules which would force unitization to prevent confiscation. In jurisdictions where laws have been passed in the exercise of the police power which provide for forced unitization the law of capture does not obtain. The conservation laws of the State of Oklahoma provide for forced unitization, so, in the case of Palmer Oil Corporation v. Phillips Petroleum Company, 231 P. 2d 997, wherein the contention was made that the law of capture applied, it was held: "The first contention is predicated solely upon the assumption that the rule of capture obtains. That it is subject to be modified by the State in the exercise of its police power we held in Wilcox Oil & Gas Co. v. Bond, 173 Okla. 348, 48 P. 2d 820. And that the right of capture as claimed herein does not obtain where by Act the State undertakes to protect the correlative rights of owners in a common source of supply, regulate the drilling and distribute the production thereof, we held in Patterson v. Stanolind Oil & Gas Co., 182 Okla. 155, 77 P. 2d 83."

Broad powers have heretofore been conferred by the Legislature in the matter of regulating the oil industry in Texas, but such powers have never been intended to include the power to force unitization. On the other hand, I am of the opinion that Article 6014g, Vernon's Annotated Civil

Statutes of Texas, denies to the Railroad Commission the power and authority to require pooling or unitizing separate leases upon separate tracts of land.

The effect of the voluntary subdivision rule on the right of the owner of land to produce the oil therein under is stated in the case of Gulf Land Company v. Atlantic Refining Company, supra:

> "* * * It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the Rule of May 29th. Empire Gas & Fuel Co. v. Railroad Commission, Tex. Civ. App., 94 S. W. 2d 1240, writ refused. The right to be protected against 'confiscation' under Commission oil and gas rules is not absolutely unconditional or unlimited. We will now discuss the condition or limitation which the Rule of May 29th has imposed or engrafted on the right to be protected against 'confiscation.'
>
> An examination of the order or Rule of May 29, 1934, hereinafter referred to as the Rule of May 29th, will show that subdivisions of land, as such, which have or hereafter may come into existence after Rule 37 became effective are not protected at all against confiscation. When Rule 37 and the Rule of May 29th are read together, it is evident that exception permits may be issued to protect such tracts from waste; but such exception permits cannot be issued to protect such tracts, as such, from confiscation. In this regard, the Rule of May 29th states 'no subdivision of property made subsequent to the adoption of the original spacing rule will be considered in determining whether or not any property is being confiscated within the terms of such spacing rule, and no

> subdivision of property will be regarded in applying such spacing rule or in determining the matter of confiscation if such subdivision took place subsequent to the promulgation and adoption of the original spacing rule.' To our minds, language could not be made plainer, or more all inclusive. Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S. W. 2d 967, supra."

Petitioner asserts the further contention that the application for permit filed by respondents "clearly involved all four lots * * * and that since respondents have utilized petitioner's two lots in securing the drilling permit for a well on the four lots, in sustaining such permit in the courts, and in securing an allowable for the well, respondents are judicially estopped to deny the right of petitioner to share in the production from such well."

I disagree with this contention. The record clearly shows that the permit granted to Pickens and Coffield was upon an application for request to drill a well of their own on Lots 10 and 11. The record shows that petitioner and the Railroad Commission were fully advised that the Pickens and Coffield application was not for a well on the four lots and the proceedings before the Commission and the courts show that Pickens and Coffield had consistently refused to make an agreement with petitioner pooling Lots 10 and 11 with Lots 12 and 13, but insisted *that the one well to which the four lots as they existed before subdivision* were entitled should properly be drilled on Lots 10 and 11. Petitioner was fully advised that Pickens and Coffield, in case the well was so drilled, would claim the right to all of the oil produced thereby.

The application does contain the sentence: "The application involves and is intended to involve the oil and gas leasehold rights, permit rights and development rights, past, present and future in Lots 10, 11, said Block 23, as well as Lots 12 and 13, Block 23, and particularly, as those rights existed and prior to October 18, 1940."

Respondents clearly stated in the application its position. In view of the vigorous contention of petitioners and the fact that the majority has upheld such contention, I quote from Form 1, Exhibit 16, the memorandum attached to the application:

> "There is attached to and made a part of this application a typewritten statement signed and sworn to by applicant's counsel. The present as well as the original oil and gas leasehold rights to Lots 10 and 11, Block 23, and Lots 12 and 13, Block 23, Hawkins Townsite, Wood County are reflected by this written statement. The application involves and is intended to involve the oil and gas leasehold rights, permit rights and development rights, past, present and future in Lots 10, 11, said Block 23, as well as Lots 12 and 13, Block 23, and particularly as those rights existed and prior to October 18, 1940.

"Case No.

"TO THE HONORABLE RAILROAD COMMISSION OF TEXAS:

"W. L. Pickens and H. H. Coffield, applicants herein, with leave of the Commission, present this their petition by way of amendment but as a part of the

attached formal application for permit, and in connection therewith would respectfully represent:

"1. Prior to the year 1919, H. C. Holmes and wife, L. D. Holmes, were the owners, or claimed to be the owners in fee of contiguous Lots Nos. 10, 11 and 12, Block 23, according to the map or plat of the Town of Hawkins, Wood County, Texas.

"2. On and prior to October 18, 1940, the owners of said Lots, being the sole heirs at law of H. C. Holmes and wife, L. D. Holmes, who had previously died intestate, were then and there as such owners seized and possessed with the right to drill one or more oil wells upon said lots that this right was subject only to the jurisdiction of this Commission to locate the point at which said well or wells should be drilled, and that said right was assignable.

"3. On October 18, 1940, and November 9, 1940, respectively, the then owners of said lots, in the exercise of their assignable rights, executed valid and subsisting oil and gas leases to Kermit Smith and F. M. Morrison (being the same as Frank Morrison) as lessees upon and covering, and intending to cover Lots 10 and 11, and in the execution of said leases thereby and thereupon conferred upon said lessees and their assigns the preferential right of immediately drilling at least one well upon one or the other of Lots 10 and 11, the preferential right thus conferred being subject only to the jurisdiction of this Commission to locate the point upon which said well should be drilled.

"4. Subsequent to the foregoing and on November 9, 1940, the said Smith and Morrison, original lessees, assigned all of their rights under said original leases upon said Lots 10 and 11 to the applicant, H. H. Coffield, and that on December 28, 1940, the said H. H. Coffield assigned all of his rights in the original leases to the applicant, W. L. Pickens, insofar as same covered Lot 11, and that at any and all times since

said dates and now, applicants are seized and possessed with valid and subsisting oil and gas leases upon Lots 10 and 11 effective as of October 18, 1940, and November 9, 1940, respectively, and likewise with a preferential right to drill at least one well upon one or the other of said Lots 10 and 11, and applicants are entitled to a permit to drill such well, even though it be held that said two lots could not have been originally developed as a separate tract; that under the undisputed facts applicants are entitled to have their two lots considered as a separate tract, and even though it be found, which is not admitted but denied, that their said two lots were originally a part of or at least contiguous to Lots 12 and 13.

"5. That applicants are entitled to a permit to drill at this time at least one well upon one or the other of their said lots in order to prevent waste, to protect vested rights and to prevent confiscation of their property, and are entitled to the issuance of the permit applied for as an exception to Rule 37. That the location of said well upon and in the geographical center of either of applicants' lots, or at such other point thereon as the Commission may determine, would be less injurious to the owners of lots or tracts adjoining or surrounding the four lots than would be the location of a well on Lots 12 and 13, and that the drilling of a well on Lots 10 or 11 instead of 12 or 13 would in no way impair or upset the drilling pattern of the Hawkins Field area.

"6. In presenting this application applicants represent that they are entitled to have considered, and hereby request the Commission to consider the status of the ownership of said four lots on or prior to October 18, 1940, and the rights of the fee owners of said four lots at that time and the necessities of the four lots at that time with respect to oil and gas development purposes.

"7. Applicants are attaching to this application appropriate map drawn to scale and properly certified, showing the location of their leases, dimensions of surrounding leases, location of the wells in the area involved, and name or names of owner or owners of leases in the adjoining and surrounding areas involved, and as well the dimensions of adjoining leases and leases in the area involved.

"8. Applicants request that proper notice of the filing of this application and the contents thereof be given to all interested parties, including but not limited to Ryan Consolidated Oil Company of Dallas, Texas, Ruby Davis, wife of Charles R. Davis, 4308 South Presser, San Antonio, Texas, W. M. Day, care Day Drug Company, Gladewater, Texas, Frank Farley, Fort Worth, Texas, Ruth Holmes, Hawkins, Texas, and Rufus Holmes, Guardian, Hawkins, Texas.

"WHEREFORE, and to the end that applicants may be permitted to recover insofar as may be all of the oil and gas underlying the lots covered by their leases, as they have the lawful right to do, and thus to save the same for their own advantage and to the advantage of the commerce and revenues of the state, pray that the exception prayed for in this their application be granted, and that they be authorized to drill at this time at least one well upon one or the other of their said lots, and in the geographical center of said lots, or at such point thereon as the Commission may determine, in order to prevent waste, to protect vested rights and prevent the confiscation of their property."

The application and the evidence introduced at the hearing on the application clearly show that respondents claimed no interest in Lots 12 and 13. Ryan also filed an application for a permit to drill on its Lots 12 and 13. The Railroad Commission understood and treated petitioner's

application as involving only Lots 12 and 13, and likewise treated respondents' application as involving a request for a permit to drill a well on Lots 10 and 11, and that each application involved separate and distinct leases. After the granting of a permit to respondents to drill a well on their own Lot 11 under Rule 37, Case No. 41816A, and the refusal of petitioner's application in Rule 37, Case No. 31814-A for a permit to drill a well of its own on Lots 12 and 13, petitioners filed a motion in respondents' case, and there sought to set aside the order granting respondents' permit. The Railroad Commission overruled petitioner's motion. The order overruling the motion refers to respondents' application as being one for a special permit to drill a well on Lots 10 and 11, Block 23, and not on Lots 10, 11, 12 and 13. When the Railroad Commission overruled petitioner's motion for rehearing on its permit case, it referred to petitioner's permit application as being a request for a permit to drill a well of its own on Lots 12 and 13 and not on Lots 10, 11, 12 and 13.

There is no foundation for the contention that the respondents' application constitutes a judicial estoppel. Petitioner took its chance. It invoked the jurisdiction of the Railroad Commission just as the respondents. Each claimed under separate leases. Petitioner knew that the Railroad Commission had the power to adopt the rule of May 29, 1934, that a subdivision in derogation of Rule 37 would be disregarded in passing on applications for permits to drill wells to prevent confiscation. The petitioner knew that the Railroad Commission did not have the power to cause a

merger or unitization of the separately owned leasehold rights of respondents in Lots 10 and 11 with those of petitioner in Lots 12 and 13.

The sentence contained in the application which petitioner contends constitutes judicial estoppel was inserted in the application in order to comply with the rule announced in the case of Railroad Commission v. Miller, 165 S. W. 2d 504 (Texas Civil Appeals), wherein it was held that the Railroad Commission could not grant a permit on a small segregated tract in derogation of Rule 37 except pursuant to an application for a permit on such small tract that invoked the jurisdiction of the Railroad Commission to consider the two subdivided tracts as they existed before division thereof and pursuant to notices issued by the Railroad Commission fully stating the character of the application.

Prior to the filing of the application involved respondents had filed applications with the Commission for a permit to drill a well on Lots 10 and 11 without mentioning Lots 12 and 13. These applications were refused because they were not in the form as required by the decision in Railroad Commission v. Miller, supra. In the order granting respondents a permit to drill a well on Lot 11, the Railroad Commission found that the application showed good cause, and that no injustice would be done by the granting of such exception to respondents, and that the permit should be granted to prevent physical waste and confiscation of property.

Petitioner also contends in its application that "Since respondents' application to the Commission clearly involved all four lots and at such time respondents owned an unleased 1/6 mineral fee in all four lots, being a co-tenant with petitioner as to Lots 12 and 13, respondents cannot secure a permit to drill on the four-lot unit and drill the well pursuant to such permit without accounting to its cotenant, petitioner, for any part of the oil produced from such four-lot unit." Here, again, petitioner proceeds on an erroneous assumption that respondents' application for a permit involved all four lots. In answer to this contention the respondents present three counter points as follows:

"COUNTERPOINT TEN

"The Holmes heirs segregated the mineral estate in Lots 10 and 11 from that in Lots 12 and 13 by separate leases to different parties and by conveying interests in royalties and in the oil payment to different parties; all owners of interests in Lots 10 and 11 and all owners of interests in Lots 12 and 13 have not joined in any transaction that would nullify this segregation; the 1/6th fee interest of Respondents in Lots 10 and 11 has not merged with the similar interest in Lots 12 and 13 and Respondents were not tenants in common with Petitioner.

"COUNTERPOINT ELEVEN

"Even if Pickens and Coffield had been cotenants of Petitioner as owners of a 1/6th mineral fee interest in Lots 10 and 11 and of a similar interest in Lots 11 and 13 so as to burden their development of Lots 10 and 11 as claimed by Petitioner, they could not as such owners drill a well on Lot 12 or Lot 13 if the leases to Ryan on Lots 12 and 13 were still effective because in such case the only right Pickens and Cof-

field would have had in relation to Lots 12 and 13 under such mineral interest would have been to affirm the lease to Ryan and afterward claim a royalty under such lease or to elect to pay 1/6th of the cost of drilling and operating any well drilled on Lots 12 and 13 and to take 1/6th of the oil produced therefrom. If the lease to Petitioner was not still effective it had lost any rights it ever had.

"COUNTERPOINT TWELVE

"Even if Respondents had been cotenants of Petitioner as owners of a 1/6th fee interest in Lots 10 and 11 and of a similar interest in Lots 12 and 13, they could not have secured as such owners a permit to drill a well on Lot 12 or on Lot 13 because the undisputed evidence showed that the best location for a well on the four lots as they existed before subdivision was on Lot 11, and the Railroad Commission refused Petitioner's application for a well on its lots pursuant to a finding that the best location was on Lot 11."

The position of respondents is sound. The mineral rights in Lots 10 and 11 were segregated from those in Lots 12 and 13 when the Holmes heirs forced the surrender by Smith and Morrison of their leasehold rights in 12 and 13. The Holmes heirs later leased Lots 12 and 13 to petitioner. The mineral lease to petitioner gave it the exclusive right to drill for oil on Lots 12 and 13. Petitioner was never a tenant in common with respondents in the fee interest or in the leasehold estate in Lots 10 and 11. See 11 Tex. Jur. 410. The fee interest owned by respondents in Lots 12 and 13 and the separate fee interest in Lots 10 and 11 did not merge into one. See 31 C. J. S. 141; Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S. W. 296; 17 Tex. Jur. 122, 123.

The theory of co-tenancy advanced by petitioner cannot prevail for another reason. Respondents acquired an undivided 1/6th mineral estate under Lots 10 and 11, and a separate undivided mineral estate under Lots 12 and 13, after petitioner obtained its lease from the Holmes Heirs. The lease granted to petitioner the exclusive right to explore Lots 12 and 13 for production of oil and to produce oil therefrom. So long as this lease remained effective, respondents' mineral estate would be subordinate to the exclusive rights of petitioner under the lease. Under such circumstances the respondents could either ratify the lease, or take 1/6 of the oil and gas less 1/6 of the expenses, see 31 Tex. Jur., §81; Texas & Pacific Coal & Oil Co. v. Kirtley, Tex. Civ. App., 288 S. W. 619, writ refused.

There is another reason why the petitioner is not entitled to equitable relief. Respondents completed the well on Lot 11 on September 13, 1946. This suit was not filed until December 13, 1950. The petitioner waited more than four years to bring its action to recover an interest in the production from the well. In the interim, it pursued another and inconsistent remedy. It asserted its right to drill a well on either Lot 12 or Lot 13. It sought in the courts to cancel respondents' permit. The petitioner made a strenuous effort to prove in the hearing before the Railroad Commission that the best location for the well was either on Lot 12 or Lot 13 and not on Lots 10 or 11, owned by respondents. The issue was decided adversely to such contention.

I contend that petitioner has never had any rights in the oil produced from the well on Lot 11. If it thought so, how-

ever, it should have followed the maxim that equity aids the diligent and not those who slumber on their rights. Callahan v. Giles, 137 Tex. 571, 155 S. W. 2d 793.

The judgment of the Court of Civil Appeals should be affirmed.

CLYDE E. SMITH
Associate Justice

Associate Justices Griffin, Calvert, and Walker join in this opinion.

B-63

No. A-4650

In the

SUPREME COURT OF TEXAS

From Wood County, Sixth District

RYAN CONSOLIDATED PETROLEUM CORPORATION,
Petitioner,

v.

W. L. PICKENS, *et al.*,
Respondents.

November 23, 1955.

The opinion rendered in this cause on the 23rd day of March, 1955, is withdrawn and the following opinion is substituted in lieu thereof.

This is a suit brought by Ryan Consolidated Petroleum Corporation, as plaintiff, for equitable relief from the confiscation of oil and gas by Pickens & Coffield, as defendants. The defendants won a take nothing judgment in the trial court which has been affirmed by the Court of Civil Appeals. 266 S. W. 2d 526.

Pickens & Coffield hold an oil and gas lease upon one half and Ryan Consolidated Petroleum Corporation holds an oil and gas lease upon the other half of a tract consisting of four lots in the Hawkins townsite. The four lots

were subdivided after Rule 37 became applicable. Respondents, in addition to the interest acquired under their lease, own an undivided 1/6th mineral estate under Lots 10 and 11, and an undivided 1/6th mineral estate under Lots 12 and 13. This interest was purchased from Mack Holmes, one of the minors who signed the original lease dated November 9, 1940. Pickens & Coffield secured a permit and drilled a well upon their one half. The Railroad Commission denied Ryan a permit to drill on its one half of the original tract, and Ryan now seeks in this suit an equitable share of the oil produced from the Pickens & Coffield well, based upon its proportionate ownership of the entire tract.

The permit was granted for the purpose of preventing confiscation and physical waste. On the question as to location of the well, Pickens & Coffield's expert witness testified that in order to best protect the drilling pattern of the field, to prevent waste, and from the viewpoint of maximum drainage efficiency and maximum production from the well throughout its future life, the well, in his opinion, should be located on Lot 11 (Pickens & Coffield lot). Ryan's geological expert, Mr. Griffin, testified that the best location for the well would be on Lot 13 owned by Ryan.

The four lots comprising one tract of .4 acre of land involved in this suit was situated in the township of Hawkins. Prior to the discovery of oil in what is now known as the Hawkins Field, the Holmes Heirs were the owners thereof. The tract is described as Lots 10, 11, 12 and 13. Lot 13 was acquired by the Holmes Heirs under the ten-year statute of limitation of the State of Texas. On October

18, 1940, the adult Holmes Heirs leased to Smith and Morrison Lots 10, 11 and 12. On November 9, 1940, the minor Holmes Heirs leased their ⅓ interest in all four lots to Smith and Morrison. On November 9, 1940, the minor Holmes Heirs leased their ⅓ interest in all four lots to Smith and Morrison. The leases to Smith and Morrison each provided that the lessor has "granted, demised, leased and let and by these presents does grant, demise, lease [and] let unto said lessee, with the exclusive right to prospect, * * * operate, produce, store and remove therefrom oil, gas, casinghead gas, and all petroleum products * * *"; and the leases further provided: "1. Lessee shall deliver to the credit of the lessor as royalty, free of cost, in the pipe line to which it may connect its wells the equal one-eighth (⅛) part of all oil produced and saved from the leased premises."

On December 13, 1940, Smith and Morrison released all of their interest in Lots 12 and 13. The release contains a ratification and confirmation of the leasehold estate held by Smith and Morrison on Lots 10 and 11. The instrument of release concludes with the following paragraphs:

> "Now therefore, in consideration of the premises and for the purposes of consummating said settlement agreement, first parties have released and quit-claimed and do by these presents release and forever quit-claim unto second parties, their heirs and assigns, all right, title, interest and claim in and to lots twelve and thirteen of Block twenty-three, town of Hawkins, Wood County, Texas, and all oil, gas and minerals in and under said lots and that may be produced therefrom, and,

> "Second parties have ratified and confirmed and do by these presents ratify and confirm unto first parties and their assigns the above mentioned oil, gas and mineral leases, executed by them and now shown of record in Wood County, Texas, and declare the same to be valid and binding in all their terms and conditions insofar as they cover and include Lots ten (10) and (11) of Block Twenty-three (23), town of Hawkins of Wood County, Texas, and no further; the intention being to correct and amend said oil, gas and mineral leases by excluding from their operation lots twelve (12) and thirteen (13) as fully as though they had originally covered lots ten (10) and eleven (11)."

On December 26, 1940, Smith and Morrison assigned the lease covering Lots 10 and 11 to Coffield, who in turn assigned the lease, so far as Lot 11 was concerned, to Pickens. On the same day, December 26, 1940, the Holmes Heirs leased their interest in Lots 12 and 13 to petitioner, Ryan. The instrument of release and confirmation above referred to was duly approved by the Probate Court of Wood County, Texas. Thus, it is clear that the adult Holmes Heirs, after October 18, 1940, and the minor Holmes Heirs after November 9, 1940, had no interest in the oil rights in and under or to be produced from Lots 10 and 11, except the reserved 1/8th of the oil and the 1/6th interest which reverted to Mack Holmes on November 8, 1943, the date of the expiration of the primary term of the original lease executed by the Holmes minors. They conveyed a determinable fee to Smith and Morrison of 7/8ths of the oil in and under Lots 10 and 11. The Holmes Heirs have never acquired by any subsequent conveyance or the

instrument of release a greater interest in Lots 10 and 11 than that which they reserved in the original lease executed on October 18, 1940. Petitioner Ryan's lease only covered Lots 12 and 13. Petitioner acquired a determinable fee of ⅞ths of oil to be produced from Lots 12 and 13 only. Ryan acquired no interest in Lots 10 and 11.

When Pickens & Coffield secured the leasehold rights in Lots 10 and 11 they were charged by law with notice of the fact that they could not drill a well thereon except to prevent waste, or by reason of the preference right as the first lessee of Lots 10 and 11 of the four lots involved, or by reason of a finding by the Railroad Commission that the best location for the one well to prevent confiscation was on one of their lots.

When Ryan secured ⅞ths of the leasehold rights in Lots 12 and 13, it was charged with notice of the fact that the four lots might not be entitled to but one well to prevent confiscation. It was charged with notice that the Holmes Heirs had executed a lease on Lots 10 and 11 to Smith and Morrison (assigned to Pickens & Coffield) providing for the exclusive right to drill a well thereon and containing a general warranty of title, and further that if the Railroad Commission found that the one well, to which the four lots were entitled to prevent confiscation, should be drilled on Lots 10 and 11, no well could be drilled on Lot 12 or on Lot 13, *except to prevent waste*. The permit granted to Pickens & Coffield was to prevent confiscation and waste. At the time the Holmes Heirs executed leases covering Lots 10 and 11 to Smith and Morrison, and later executed leases to

Ryan covering Lots 12 and 13, it was not known whether the Railroad Commission would decide that two wells were necessary to prevent waste.

Petitioner asserts the further contention that the application for permit filed by respondents "clearly involved all four lots * * * and that since respondents have utilized petitioner's two lots in securing the drilling permit for a well on the four lots, in sustaining such permit in the courts, and in securing an allowable for the well, respondents are judicially estopped to deny the right of petitioner to share in the production from such well." We cannot agree with this contention. The record shows that the permit granted to Pickens & Coffield was upon an application for request to drill a well of their own on Lots 10 and 11. The record shows that petitioner and the Railroad Commission were fully advised that the Pickens & Coffield application was not for a well on the four lots and the proceedings before the Commission and the courts show that Pickens & Coffield had consistently refused to make an agreement with petitioner pooling Lots 10 and 11 with Lots 12 and 13, but insisted *that the one well to which the four lots as they existed before subdivision* were entitled should properly be drilled on Lots 10 and 11. Petitioner was fully advised that Pickens & Coffield, in case the well was so drilled, would claim the right to all of the oil produced thereby. The application does contain the sentence: "The application involves and is intended to involve the oil and gas leasehold rights, permit rights and development rights, past, present and future in Lots 10, 11 said Block

23, as well as Lots 12 and 13, Block 23, and particularly, as those rights existed and prior to October 18, 1940." This sentence which petitioner contends constitutes judicial estoppel was inserted in the application in order to comply with the rule announced in the case of Railroad Commission v. Miller, Tex. Civ. App., 165 S. W. 2d 504, wherein it was held that the Railroad Commission could not grant a permit on a small segregated tract in derogation of Rule 37 except pursuant to an application for a permit on such small tract that invoked the jurisdiction of the Railroad Commission to consider the two subdivided tracts as they existed before division thereof and pursuant to notices issued by the Railroad Commission fully stating the character of the application.

Prior to the filing of the application involved respondents had filed applications with the Commission for a permit to drill a well on Lots 10 and 11 without mentioning Lots 12 and 13. These applications were refused because they were not in the form as required by the decision in Railroad Commission v. Miller, supra. In the order granting respondents a permit to drill a well on Lot 11, the Railroad Commission found that the application showed good cause, and that no injustice would be done by the granting of such exception to respondents, and that the permit should *be granted to prevent physical waste and confiscation of property.*

Petitioner does not claim title to Lots 10 and 11. Neither do Pickens & Coffield claim any rights acquired by Ryan under its lease from the Holmes Heirs covering Lots 12

and 13. Each party filed separate applications for permits to drill on their respective lots. The Railroad Commission understood and treated petitioner's application as involving only Lots 12 and 13, and likewise treated respondents' application as involving a request for a permit to drill a well on Lots 10 and 11, and that each application involved separate and distinct leases. After the granting of a permit to respondents to drill a well on their own Lot 11 under Rule 37, Case No. 41816-A, and the refusal of petitioner's application in Rule 37, Case No. 31814-A for a permit to drill a well of its own on Lots 12 and 13, petitioners filed a motion in respondents' case, and there sought to set aside the order granting respondents' permit. The Railroad Commission overruled petitioner's motion. The order overruling the motion refers to respondents' application as being one for a special permit to drill a well on Lots 10 and 11, Block 23, and not on Lots 10, 11, 12 and 13. When the Railroad Commission overruled petitioner's motion for rehearing on its permit case, it referred to petitioner's permit application as being a request for a permit to drill a well of its own on Lots 12 and 13 and not on Lots 10, 11, 12 and 13. So, what was the relationship between the parties, and what rules governed the Railroad Commission in determining the issue before it? The release and confirmation above referred to cannot be held to operate as a conveyance to the Holmes Heirs or their assignee, Ryan, of any rights in Lots 10 and 11 for the reason that the Holmes Heirs did not have any interest except the reserved 1/8th royalty at the date of the release and confirmation. Since

Smith and Morrison acquired their lease on October 18, 1940, and the release executed at a subsequent date did not affect their rights under the lease, it naturally follows that Smith and Morrison and their assigns would have had the right on and after October 18, 1940, to drill on Lots 10 and 11 all the wells the Railroad Commission would permit to prevent *waste*, and did, under well-established rules, have a preference right to drill the one well the four lots were entitled to before subdivision to prevent *confiscation, provided the Commission, based on substantial evidence,* located such well on either Lot 10 or Lot 11. The well was located on Lot 11 (Pickens & Coffield), and was completed as a commercial producer of oil on September 13, 1946. Ryan's application for a permit to drill on Lots 12 and 13 was denied by the Railroad Commission, and the findings of the Railroad Commission, so far as the location of the well is concerned have been upheld by the district court and the Court of Civil Appeals. Ryan Consol. Petroleum Corp. v. Pickens, et al., 266 S. W. 2d 526.

Now, who is entitled to the oil? There is only one answer to this question. Pickens and Coffield are entitled to keep ⅞ths of the oil produced from the well and the Holmes Heirs, or their assigns, were entitled to have delivered to them the ⅛th of all the oil produced from said well, all in accordance with the express terms of the lease dated October 18, 1940, unaffected by the subsequent release to the Holmes Heirs of Lots 12 and 13. To hold otherwise would be contrary to the well settled law in Texas. In our case, the parties were relegated to such rights to drilling per-

mits as existed prior to October 18, 1940, the date of the first subdivision of Lots 10, 11 and 12. Prior to that date Lots 10, 11, 12 and 13 were under one common ownership. The Railroad Commission considered the tract as it existed prior to October 18, 1940. The notice of hearing, as well as the notice on rehearing, contained the provision that the rights to be considered were those existing on or before October 18, 1940. Prior to the first subdivision neither Rule 37 nor the subdivision rule of May 29, 1934, had any application and the tract comprising the four lots was entitled to a well permit as a matter of law. Brown v. Hitchcock, Tex. Civ. App., 235 S. W. 2d 478, wr. ref.; Nash v. Shell Petroleum Corp., Tex. Civ. App., 120 S. W. 2d 522, er. dism.; Shell Petroleum Corp. v. Railroad Commission, Tex. Civ. App., 116 S. W. 2d 439, er. dism. The effect of the voluntary subdivision rule on the right of the owner of land to produce the oil thereinunder is well stated in the case of Gulf Land Company v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. 2d 73. In that case this Court held that the Railroad Commission cannot grant a well permit on a tract subdivided in derogation of Rule 37 to prevent confiscation, but can grant a permit for a well on such tract to prevent waste. The Court further said:

> "* * * It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the Rule of May 29th. Empire Gas & Fuel Co. v. Railroad Commission, Tex. Civ. App., 94 S. W. 2d 1240, writ refused. The right to be protected against 'confiscation' under

Commission oil and gas rules is not absolutely unconditional or unlimited. We will now discuss the condition or limitation which the Rule of May 29th has imposed or engrafted on the right to be protected against 'confiscation.'

"An examination of the order or Rule of May 29, 1934, hereinafter referred to as the Rule of May 29th, will show that subdivisions of land, as such, which have or hereafter may come into existence after Rule 37 became effective are not protected at all against confiscation. When Rule 37 and the Rule of May 29th are read together, it is evidence that exception permits may be issued to protect such tracts from waste; but such exception permits cannot be issued to protect such tracts, as such, from confiscation. In this regard, the Rule of May 29th states 'no subdivision of property made subsequent to the adoption of the original spacing rule will be considered in determining whether or not any property is being confiscated within the terms of such spacing rule, and no subdivision of property will be regarded in applying such spacing rule or in determining the matter of confiscation if such subdivision took place subsequent to the promulgation and adoption of the original spacing rule.' To our minds, language could not be made plainer, or more all inclusive. Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S. W. 2d 967, supra."

Petitioner knew that the Railroad Commission had the power to adopt the Rule of May 29, 1934, providing that a subdivision in derogation of Rule 37 would be disregarded in passing on applications for permits to drill wells to prevent confiscation. The petitioner knew that the Railroad Commission did not have the power to cause a merger or unitization of the separately owned leasehold rights of

respondents in Lots 10 and 11 with those of petitioner in Lots 12 and 13.

Petitioner's contention that this case is one for equitable relief should not be sustained for the further reason that its position is inconsistent with the law of capture, which is a well-settled rule of property in this jurisdiction. The rule of capture is simply this—that the owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though part of such oil or gas may have migrated from adjoining land. The Railroad Commission is without power from the Legislature or by decisions of this Court to do anything more than declare illegal the drilling of wells which are prohibited by Rule 37. The Railroad Commission cannot change the law of Texas. The Legislature of this State has heretofore conferred broad, extensive and exclusive regulatory powers upon the Railroad Commission of Texas in the regulation of the oil industry of this State, but the Commission has not been given the power to determine property rights as between litigants. The courts, whether sitting as court of law or equity, determine such matters in accordance with existing laws in Texas.

Petitioner insists that the Mississippi case, Hassie Hunt Trust v. Proctor, 60 So. 2d 551, is directly in point. An examination of that case, as well as the case of Griffith v. Gulf Refining Co., 60 So. 2d 518, convinces us that the situation in Mississippi is entirely different from that in Texas. The case of Merrill Engineering Co. v. Capital National Bank, 192 Miss. 378, 5 So. 2d 666, was decided by

the Supreme Court of Mississippi on January 26, 1942. That case involved the same question as we have here, and the Court recognized the rule of capture. However, the case was decided prior to legislative enactments in the State of Mississippi which had the effect of limiting and circumscribing the rule of capture. When the Griffith and Hassie Hunt Trust cases were decided in 1942, the Legislature of that State had prior thereto enacted Chapter 117, Laws of 1932, Code 1942, Sec. 6132, et seq. Paragraph (b), Section 6140, Code 1942, which made it "the duty of the State Oil and Gas Board to prorate and regulate the gas well production from each common source of supply 'for the protection of public and private interests, *and to adjust the correlative rights and opportunities of each owner of gas in a common source of supply to produce, use or sell such gas*'." (Emphasis added.)

As said in the Griffith case, supra: "The above statutes were forerunners of Chapter 256, Laws of 1948, and amendments thereto, Code 1942, Sec. 6132-01, et seq. It will be seen that the same general idea permeates the declaration of public policy in Section 1 of said Chapter as follows: "'to protect the public and private interests against the evils of waste in the production and utilization of oil and gas, by prohibiting waste as herein defined; *to safeguard, protect and enforce the co-equal and correlative rights of owners in a common source or pool of oil and gas to the end that each such owner in a common pool or source of supply of oil and gas may obtain his just and equitable share of production therefrom;* * * *'." (Emphasis added.)

Section 10, Chapter 256 of the Laws of 1948, contains paragraph (b), " 'The Board shall in all instances where a unit has been formed out of land or areas of more than one ownership, require the operator when so requested by an owner, to deliver to such owner or his assigns his proportionate share of the production from the well common to such drilling unit, provided, however, that such owner receiving same shall provide at his own expense proper receptacles for the receipt or storage, of such oil or distillate'."

The Griffith case expressly says that the question involved must be viewed in the light of these statutes. Having reached such conclusion, the court said: "We must at once brush aside such cases as Japhet v. McRae, Tex. Com. App., 276 S. W. 669 * * * and Bruce v. Ohio Oil Co., 10 Cir., 169 F. 2d 709, 713, which deal with common law principles of unrestricted capture." The Legislature of Texas has not seen fit to enact legislation which would authorize the Railroad Commission to adopt and promulgate rules which would have the effect of rendering ineffective the rule of capture recognized in all of the decisions in this state. As was said in the case of Gulf Land Co. v. Atlantic, supra: "Said subdivided tracts as such are not protected at all against confiscation." Since the leases owned by Pickens & Coffield vested a determinable fee estate in the oil and gas under Lots 10 and 11, and since they had the exclusive right to drill a well thereon and to produce and take all the oil and gas that was produced as a result of proper drilling operations, and since the con-

servation statutes and the regulations of the Commission have not abolished the ownership of oil in place nor the right of capture, the respondents have the vested right to produce, store and remove from said lots through the well located on Lot 11, all the oil, gas, casinghead gas and other petroleum products, and this without liability to the petitioner, Ryan, the owner of the leasehold rights under its lease covering Lots 12 and 13. The rule applicable to the case at bar is well stated in 31-A Tex. Jur., Sec. 5, pp. 24-27, as follows:

> "* * * In some states, the law looks to the fugaciousness of oil and gas in place and considers that they belong to no one until captured and confined. But this theory does not find approval in Texas. Here oil and gas in place are by the established rules of property a part of the realty or corpus of the land, and subject to ownership, severance, conveyance, lease and taxation as such. Being interests in land they are not subject to parol sale, but have the protection of the statute of frauds, the statutes regulating conveyances and mortgages of real estate, and the statutes requiring the recording of instruments affecting title to or liens on land. They are realty within statutes relating to venue. When oil or gas is removed from the soil it becomes personalty. The conservation statutes and the regulations of the Commission made thereunder have not abolished the ownership of oil in place nor the right of capture without liability to adjoining owners."

The courts of Texas have consistently held that the rule of capture is still in force in this State. It has become a vested property right. As said in the case of Brown v. Humble, 126 Tex. 296, 83 S. W. 2d 935: "Owing to the peculiar

characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right." In the case of Japhet v. McRae, Tex. Com. App., 276 S. W. 669, Japhet made the following contention:

> "Where the lessor of land for oil and gas, subsequently to the execution of the lease, but prior to the development of the land and the production of oil or gas under the lease, sells a portion or portions of the land to others, and oil and gas are thereafter produced under the lease from some portion of the leased premises, the royalties therefrom belong to the owner of the particular tract upon which the well is located, and the owner or owners of other portions of the leased premises have no interest therein."

In affirming the trial court's judgment which upheld such contention, the Court said, in part:

> "• • • As our Supreme Court has held, oil is fugitive in its nature, and ordinarily should belong to him who captures it and brings it to the surface. The quest for it involves tremendous expense and a vast element of chance. In spite of the scientific knowledge of the geologists, the industry still partakes largely of a gamble. It seems to us that the only safe rule, and the only one free from much confusion, is the one which gives the oil to the man who owns the land upon which the well is located. • • •."

Petitioner also contends in its application that "since respondents' application to the Commission clearly involved all four lots and at such time respondents owned an un-

leased 1/6th mineral fee in all four lots, being a co-tenant with petitioner as to Lots 12 and 13, respondents cannot secure a permit to drill on the four-lot unit and drill the well pursuant to such permit without accounting to its co-tenant, petitioner, for any part of the oil produced from such four-lot unit." Here, again, petitioner proceeds on an erroneous assumption that respondents' application for a permit involved all four lots. In answer to this contention the respondents present two counter points as follows:

"COUNTERPOINT TEN

"The Holmes heirs segregated the mineral estate in Lots 10 and 11 from that in Lots 12 and 13 by separate leases to different parties and by conveying interests in royalties and in the oil payment to different parties; all owners of interests in Lots 10 and 11 and all owners of interests in Lots 12 and 13 have not joined in any transaction that would nullify this segregation; the 1/6th fee interest of Respondents in Lots 10 and 11 has not merged with the similar interest in Lots 12 and 13 and Respondents were not tenants in common with Petitioner.

"COUNTERPOINT ELEVEN

"Even if Pickens and Coffield had been cotenants of Petitioner as owners of a 1/6th mineral fee interest in Lots 10 and 11 and of a similar interest in Lots 12 and 13 so as to burden their development of Lots 10 and 11 as claimed by Petitioner, they could not as such owners drill a well on Lot 12 or Lot 13 if the leases to Ryan on Lots 12 and 13 were still effective because in such case the only right Pickens and Coffield would have had in relation to Lots 12 and 13 under such mineral interest would have been to affirm the lease to Ryan and afterward claim a royalty under such lease or to elect to pay 1/6th of the cost of

drilling and operating any well drilled on Lots 12 and 13 and to take 1/6th of the oil produced therefrom. If the lease to Petitioner was not still effective it had lost any right it ever had."

The position of respondents is sound. The mineral rights in Lots 10 and 11 were segregated from those in Lots 12 and 13 when the Holmes Heirs forced the surrender by Smith and Morrison of their leasehold rights in Lots 12 and 13. The Holmes Heirs later leased Lots 12 and 13 to petitioner. The mineral lease to petitioner gave it the exclusive right to drill for oil on Lots 12 and 13. Petitioner was never a tenant in common with respondents in the fee interest or in the leasehold estate in Lots 10 and 11. See 11 Tex. Jur. 410. The fee interest owned by respondents in Lots 12 and 13 and the separate fee interest in Lots 10 and 11 did not merge into one. See 31 C. J. S. 141; Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S. W. 296; 17 Tex. Jur. 122, 123.

The theory of co-tenancy advanced by petitioner cannot prevail for another reason. Respondents acquired the above mentioned undivided 1/6th mineral estate under Lots 10 and 11, and a separate undivided mineral estate under Lots 12 and 13, after petitioner obtained its lease from the Holmes Heirs. The lease granted to petitioner the exclusive right to explore Lots 12 and 13 for production of oil and to produce oil therefrom. So long as this lease remained effective, respondents' mineral estate would be subordinate to the exclusive rights of petitioner under the lease. Under such circumstances the respondents could either ratify the

lease or take 1/6th of the oil and gas less 1/6th of the expenses. See 31 Tex. Jur. 657, Sec. 81; Texas & Pacific Coal & Oil Co. v. Kirtley, Tex. Civ. App., 288 S. W. 619, wr. ref.

Respondents' motion for rehearing is granted and the judgments of the trial court and the Court of Civil Appeals are affirmed.

CLYDE E. SMITH

Chief Justice Hickman and Associate Justices Garwood and Wilson dissenting.

B-83

No. A-4650

In the

SUPREME COURT OF TEXAS

From Wood County, Sixth District

RYAN CONSOLIDATED PETROLEUM CORPORATION,
Petitioner,

v.

W. L. PICKENS, *et al.*,
Respondents.

DISSENTING OPINION

November 23, 1955.

I respectfully dissent. The majority opinion permits the confiscation by Pickens & Coffield of minerals belonging to Ryan. In doing so, the constitutionality of Rule 37 is put in question in that Ryan is deprived of its property without due process of law.

The majority opinion, based primarily on the rule of capture, makes only a partial statement of the rule of capture as I understand it, saying: "The rule of capture is simply this—that the owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though part of such oil or gas may have migrated from adjoining land." Why is this much of the rule so?

Because the owner of the adjoining tract from which the oil is migrating can protect himself by drilling offset wells. This equal right to drill has always supported the constitutionality of the rule of capture. Take it away and the reason for the rule fails, leaving a result not only unjust but one inconsistent with the fundamental concept of ownership of oil and gas in place as a part of the realty. Drainage of adjoining property under the law of capture was rationalized with ownership in place in Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566, on the basis of equal rights to drill. Under our law no one has a right simply to capture the property of someone else. But because of early difficulty in determining the source of oil produced from a well we stopped judicial inquiry at the mouth of the well, called it the rule of capture, and said that adjoining landowners could protect themselves by going and doing likewise. Admittedly this was a matter of expediency, and in the then state of the oil business and the then knowledge of reservoir dynamics, it reached a practical result.

This impulse to stop judicial inquiry at the mouth of the well springs from a judicial conviction that the subterranean movement of liquids is too "occult and secret" to be the proper subject matter of proof. See, for instance, a parallel conviction underlying the majority opinion in the recent water case of City of Corpus Christi v. City of Pleasanton, ... Tex. ....., 276 S. W. 2d 798. There was more justification for this feeling fifty years ago than there is now. I went to the trouble of writing a dissent in that case

as I do in this case because of my belief that the principles of geology and reservoir dynamics will eventually win the same acceptance in judicial thought that they are accorded in business and financial thinking.

Now apply in a controlled reservoir this rule of capture to a small area of ground which under Rule 37 is a one-well unit. The whole basis of a compulsory well-spacing rule is that the well allocated to a given space will eventually produce all of the recoverable oil under that space. The constitutional basis for so policing the development of real property lies in the State's power to conserve and prevent the waste of its natural resources even though owned as private property. But because oil and gas in place is realty and is private property, not one square foot can be confiscated without payment of compensation. A basic spirit of fairness and a desire for objectivity makes the law, in the figurative language of the old writers, "frown" on exceptions to general rules, but we do have a recognized exception to Rule 37 made necessary by the Texas concept of the ownership of oil and gas in place as a part of the fee simple. That is this: A well permit will be allocated as a matter of law to an area smaller than the minimum under the spacing pattern for the particular field in order to prevent the confiscation of the oil and gas in place. But, obviously, if no time limit were placed on the origin of the small tract, a landowner strategically located on the top of a structure could gain an unfair advantage by selling off

small tracts. So no drilling permit will be issued to a small tract as an exception to the spacing rule to prevent confiscation if the subdivision be created after the discovery of oil and gas. So we must start with the proposition that the well permit granted to prevent confiscation of the oil under Lots 10, 11, 12, and 13 will produce all the recoverable oil under those lots. If this be not so then the Railroad Commission has made an error in the spacing pattern for the field. As a matter of fact, these "exception" wells on small tracts usually produce far more than their fair share. The constitutional basis for the granting of this exception well permit in the first place— preventing the confiscation of the oil under Lots 10, 11, 12, and 13—partially fails if Ryan, as the true owner of the oil under Lots 12 and 13, has that oil confiscated by Pickens & Coffield.

By all the rules of estoppel Pickens & Coffield should not be allowed to deny that the well permit was granted for the purpose of preventing confiscation of the oil under Lots 10, 11, 12, and 13 and is actually producing from all four lots. In any event, and with or without estoppel, the history of the permit proceedings before the Railroad Commission should establish this as a matter of law. Coffield first applied for a permit to drill lot 10 and Pickens separately applied for a permit to drill lot 11. Both were denied February 28, 1941. Next Ryan applied for a permit to drill one well on lots 12 and 13 and on April 7, 1941 this also was denied. Pickens again applied for a permit to drill lot 11 and this was again denied on August 22, 1941.

On November 14, 1945 Pickens & Coffield filed an application to drill one well on lots 10 and 11. The notice for this application stated:

> "The application involves, and is intended to involve the oil and gas leasehold rights, permit rights, and development rights, past, present and future, in Lots 10 and 11, Block 23, as well as Lots 12 and 13, Block 23, and particularly as those rights existed on and prior to October 18, 1940."

On November 16, 1945 Ryan applied for a permit to drill a well on lots 12 and 13. The notice contained the following paragraph:

> "The application involves, and is intended to involve the oil and gas leasehold rights, permit rights, and development rights, past, present and future, in Lots 12 and 13, Block 23, as well as Lots 10 and 11, Block 23, Hawkins townsite."

On December 21, 1945 both applications were denied. On February 26, 1946 rehearings were granted on both applications. A consolidated rehearing was held on March 12, 1946. On April 3, 1946 the Commission granted the Pickens & Coffield application in the following language:

> "NOW, THEREFORE, IT IS ORDERED that the application of Pickens & Coffield, together with the application of Ryan Consolidated Petroleum Corporation for a permit to drill one well only on the four lots, Nos. 10, 11, 12 and 13, Block 23, said lots being owned jointly as follows: Nos. 10 and 11, by Pickens and Coffield, and Nos. 12 and 13 by Ryan Consolidated Petroleum Corporation, and the well being requested as well No. 1, Heirs of H. C. Holmes, et ux. Lots 10 11, 12 and 13, Block 23, Hawkins townsite, Wood County, Texas, as shown by plat submitted, is hereby

approved and since these four lots were originally one tract, it is the intention of the Commission to grant one well on the four lots and let both applicants share equally in the benefits of the one well the location of same being as follows:

"In the exact center of Lots 10, 11, 12 and 13, Block 23, Hawkins Townsite, and being midway between the north and south lines of said tract of four lots, and on the line between Lots 11 and 12."

On the same day the Ryan application was denied "in as much as applicant's interest is being taken care of in the well being granted on the four lots 10, 11, 12 and 13 and being located half on the Ryan Consolidated property and half on the Pickens and Coffield property, it being the intention of the Commission to grant only one well on these four lots and have the two applicants share equally in this one well, * * *."

Subsequently, rehearings were granted by the Commission on both applications. The notice of rehearing on the Pickens & Coffield application contained at their request the following paragraph:

"The application involves, and is intended to involve the oil and gas leasehold rights, and development rights, past, present and future, in Lots 10 and 11, Block 23, as well as Lots 12 and 13, Block 23, and particularly as those rights existed on and prior to October 18, 1940."

On July 3, 1946 the Commission granted Pickens & Coffield application for "a permit to drill well No. 1, Heirs of H. C. Holmes et ux., Lots 10, 11, 12 & 13." This is the

permit under which the well was drilled. On July 5, 1946 the Commission denied the Ryan application. On August 7, 1946 Pickens & Coffield mutually conveyed to each other so that thereafter they each owned a one half (½) interest in a lease of five sixths (5/6) of lots 10 and 11.

On November 21, 1946 Ryan perfected an appeal to the District Court of Travis County by filing a Rule 37 suit attacking the Pickens & Coffield permit and the Commission's action in refusing their own application. The trial court judgment in that Rule 37 case denied both permits. In his conclusion No. 4 the trial court said:

> "Said four lots being capable of full development as a whole or entire tract for oil and gas purposes by one well, and being entitled to at least one well, but neither said Lots Nos. 10 and 11, considered as a unit, nor said Lots Nos. 12 and 13, considered as a unit, being capable of separate development in compliance with the rules and regulations of the Railroad Commission applicable to said field, the owners of leases in said four lots should be relegated to the situation as it existed prior to the subdivision of said four-lot area into separate lease tracts, which was a joint right to drill for the benefit of the owners of the oil, gas and other minerals in and under all four lots and the owners thereof have not been and are not so relegated until their separate lease tracts have been reunited as they were prior to leasing, either by pooling or by application for the joint development of the four lots for the use and benefit of the owners of the said four lots, neither of which has been done. The Railroad Commission, therefore, either should have denied both applications or withheld action thereon until such had been done, and its failure so to do is arbitrary, capricious, improper and unjust in that the granting to

> one and denying to the other of the applicants a permit to drill constitutes an attempt by the Commission to decide and declare priority of rights when no priority of rights exists."

Both appealed. The Court of Civil Appeals reversed the trial court and rendered judgment affirming the Commission in granting the Pickens & Coffield permit and in denying the Ryan permit. 219 S. W. 2d 150.

It seems to me sheer blindness to hold that this record does not establish as a matter of law that the well was granted to prevent confiscation of the oil under Lots 10, 11, 12, and 13. But in the face of this the majority allows the confiscation of the oil under Lots 12 and 13—that is, if you define confiscation as the taking of property from the true owner without the payment of compensation. And can the majority deny the oil under Lots 12 and 13 belongs to Ryan? Not at all. Can the majority deny that its holding allows Ryan's oil under Lots 12 and 13 to be produced by Pickens & Coffield without payment to Ryan? It cannot and does not deny this, but in consolation cite Ryan to one half of the law of capture, saying in effect, "You cannot get a permit to drill on Lots 12 and 13, but if you could, you would protect yourself against drainage by drilling an offset well."

The difficulties of the majority with the law of capture are illustrated by its quotations from authorities holding that in Texas law oil is not fugacious but is fugitive—certainly an empty play on words. The majority quotes 31-A Tex. Jur. §5, pp. 24-27, as follows:

> "* * * In some states, the law looks to the fugaciousness of oil and gas in place and considers that they belong to no one until captured and confined. But this theory does not find approval in Texas. Here oil and gas in place are by the established rules of property a part of the realty or corpus of the land, and subject to ownership, severance, conveyance, lease and taxation as such. * * *."

It follows this by a quotation from Japhet v. McRae, Tex. Com. App., 276 S. W. 669, as follows:

> "* * * As our Supreme Court has held, oil is fugitive in its nature, and ordinarily should belong to him who captures it and brings it to the surface. * * *."

But whether you call oil fugacious or fugitive is immaterial, and apart from the specific holdings giving them legal content, words do not mean much anyway. The important thing is to keep enforced well spacing as an operating principle in the development of oil fields. To do this the courts must preserve its constitutionality by carefully prescribing its limits and its effect. This decision will help break down Rule 37 and make its enforcement more difficult.

Suppose the Commission had refused to grant either side a permit and each had come into court and established that the entire tract of four lots was entitled to one well to prevent confiscation from all four lots. What could the courts do?

Pickens & Coffield claim that they cannot be forced to pool their lease with Ryan. Ryan claims that this conten-

tion puts the proposition exactly backwards. The true situation, according to Ryan, is that Rule 37 prevents the subdivision of a tract for oil and gas production purposes, and, rather than this being a forced pooling situation, Rule 37 prevents separate tracts from coming into existence, leaving the tract entire for oil and gas production purposes. Under this contention the minerals are frozen as one tract for drilling purposes as of the time Rule 37 attaches, but the parties are free to convey subdivisions as they will.

Pickens & Coffield contend that if the tract of land be treated as a unit for production of oil and gas and be entitled to one well only, the owner of the particular spot upon which the well is located has the right to the entire production from the whole unsubdivided tract. The location of the well is to be determined by the Railroad Commission without regard to ownership and at a point which will result in the most production and the least waste with due regard to the systematic development of the field. In their brief they state:

> "The net effect of Railroad Commission v. Miller, 165 S. W. 2d 504, is that the result of such a subdivision is that neither subdivided parcel as such is protected against confiscation; that the Commission can locate the well that was theretofore justified on the tract as it existed before subdivision at the *best point thereon;* and that the owner of the leasehold estate in the subdivision on which the well is granted will get all the oil and the owner of the other subdivision none."

Ryan replies that as between the individual owners of the subdivision of the tract, this makes the well location a matter of pure chance which no one can foresee. Ryan points out that under this theory had the best location been determined to be twenty five feet east of where it is, the situation of the parties to this suit would have been completely reversed, and "The Railroad Commission has no power to take property from one person and give it to another by the mere location of a well site."

In actual operation the majority opinion will put an intolerable burden on the Railroad Commission. Obviously we should not in this situation require the Railroad Commission to choose arbitrarily between rival applicants and determine which owner can produce for the entire tract as a matter of grace or favor. Such a legal result should be utterly foreign to our form of government, but here, under the majority opinion the movement of the well location a few feet would have transferred the enjoyment of all the oil under all four lots. For most of the typical geologic structures, scientific data do not afford the Railroad Commission a basis for choice between two locations only a few feet apart. The effect of the majority opinion is to put the Railroad Commission in an unenviable position as possibly the subject of an influence battle.

Suppose the Railroad Commission should find that there is no scientific or factual basis for choosing between the rival applicants? But even if there be a scientific basis for moving the well location a few feet one way or the other,

doesn't this make very valuable property rights hinge absolutely on the judgment of an expert?

It being established that, first, the well is allocated to and is in fact producing from a tract consisting of all four lots; that, second, Pickens & Coffield own a lease upon only one half (½) of that tract plus a one sixth (1/6th) mineral interest in the whole tract; and that, third, Ryan cannot under Rule 37 obtain a drilling permit for a well by which to produce the minerals under its lease upon the other one half, it becomes apparent that Pickens & Coffield should be required in equity to account for the oil and gas they are producing which they do not own and which is the property of Ryan. Otherwise the mineral rights under Lots 12 and 13 are in fact just what Pickens & Coffield say Ryan bought—a dead horse. This dead horse contention is simply another way of saying that Rule 37 invalidates conveyances made after it attaches, a legal proposition which both parties agree to be wrong. Magnolia Petroleum Co. v. Railroad Commission, 141 Tex. 96, 170 S. W. 2d 189; Nash v. Shell Petroleum Co., CCA 1938, er. dism., 120 S. W. 2d 522. Pickens & Coffield made it clear throughout their brief that in their opinion a subdivision contrary to Rule 37 is valid and binding as between the parties. They seek to take all real meaning out of it, however, by denying to both halves of the subdivision the right to participate in the oil after it is produced. The well was applied for and granted by the Railroad Commission for the express purpose of preventing the confiscation of the minerals under all four lots. Can Pickens & Coffield obtain a permit to

prevent confiscation of the minerals under lots 12 and 13 and then refuse to account to the owner of those minerals? Of what value would it be to Ryan as the owner of the minerals under lots 12 and 13 to be protected against confiscation generally only to lose them to Pickens & Coffield? On what theory can Pickens & Coffield drill a well to protect lots 12 and 13 against confiscation if it is not for the benefit of the owner of those minerals?

In the case at bar, Pickens & Coffield conveyed by release a part of the minerals, and this was valid. Why is it not a just result for the law to require them and others so conveying to honor their conveyance?

The apparently simple solution adopted by the majority is too simple, is contrary to the theory of ownership in place, and is an actual adoption of the fugacious theory of other states. It will work a very unfair and harsh result, will put the Railroad Commission to arbitrary decisions, will operate to confiscate the oil of Ryan without payment, and will give that oil to Pickens & Coffield in derogation of their conveyance of that very oil. I would remand for an equitable accounting.

WILL WILSON
Associate Justice

Chief Justice Hickman and Associated Justice Garwood join in this dissent.

APPENDIX C

JUDGMENT AND ORDERS IN THE COURTS BELOW

No. 10,032

In the District Court of Wood County,
115th Judicial District of Texas

RYAN CONSOLIDATED PETROLEUM CORPORATION

v.

W. L. PICKENS, *et al.*

JUDGMENT

On the 2nd day of June, 1952, at a regular term of this court, came on for trial the above entitled and numbered cause, and thereupon came plaintiff, Ryan Consolidated Petroleum Corporation, and defendants, W. L. Pickens, H. H. Coffield, W. M. Day, P. P. Grandbery, Mrs. Della Day James, Clara May Perkins and husband, Tom W. Perkins, Jr., Mack Holmes, W. A. Pounds, Bobby Manziel and M. H. Barton, court-appointed guardian ad litem for Sally Adelle Perkins, Clara Marie Perkins and Patricia Jane Perkins, minors, and announced ready, but the defendants, Frank M. Farley, Ruby Davis and husband, Charles R. Davis, Ruth Holmes, a minor, and Rufus Holmes, guardian of estate of said minor, though duly

cited to appear, as required by law, failed to appear and answer, and thereupon the defendants, Pickens and Coffield, presented to the court their special exceptions as set forth in their third amended original answer directed to the plaintiff's third amended original petition, which was by the court overruled, and to which ruling said defendants excepted.

Thereupon and thereafter all matters in controversy, of fact as well as of law, were submitted to the court without the intervention of a jury, and the court proceeded to hear evidence adduced upon the trial of said couse, and after the close of the introduction of evidence, the court advised the parties that he would take under advisement his decision in the case, and that said parties might file such written briefs as they desired.

Thereafter the court continued the term of court in which said cause was heard in order that he might give further consideration to his decision in said cause, and on this the undersigned date the court, after such further consideration as to his decision, and upon a re-consideration of the pleadings, the evidence and argument of counsel, is of the opinion and so finds and concludes that the plaintiff should take nothing by its suit against said defendants, and that said defendants should go hence with their costs without day.

And it appearing to the court that M. H. Barton, an attorney of this Bar, served upon appointment of this court as guardian ad litem to represent the Perkins minor defendants, and that as such officer he should be paid a

reasonable fee, which the court finds to be the sum of $100.00;

IT IS THEREFORE ACCORDINGLY ORDERED, ADJUDGED AND DECREED by the court that the plaintiff, Ryan Consolidated Petroleum Corporation, take nothing by reason of its suit against said defendants, or either of them, and that all court costs herein incurred, including the fee of the guardian ad litem, which is hereby taxed as a part of the costs in said cause, be and the same are hereby taxed against the plaintiff, to which let execution issue; and to which action and judgment of said court the plaintiff in open court duly excepted and gave notice of appeal to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas.

This judgment is rendered and entered, and is to become effective as of this the 15th day of December, A. D. 1952.

/s/ T. C. CHADICK
Judge

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Court of Civil Appeals of Texas

FOR THE SIXTH SUPREME JUDICIAL DISTRICT

JUDGMENT

Be it remembered that on Thursday, the 4th day of February, 1954, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, met in the City of Texarkana, Texas. Present: Reuben A. Hall, Chief Justice; I. N. Williams, Associate Justice; Wm. J. Fanning, Associate Justice; and M. E. Merrill, Clerk.

No. 6704

RYAN CONSOLIDATED PETROLEUM CORPORATION,
Appellant,

v.

W. L. PICKENS, *et al.*,
Appellees.

Appealed from District Court of Wood County

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things, affirmed; that the appellees, W. L. Pickens, H. H. Coffield, Frank M. Farley, W. M. Day, P. P. Grandberry, Ruby Davis and husband, Charles R. Davis; Mrs. Della Day James, Individually and as Independent Executrix of the Estate of

Cleve James, Deceased; Clara May Perkins and husband, Tom W. Perkins, Jr.; Mack Holmes; W. A. Pounds; Bobby Manziel; Sallie Adelle Perkins, Clara Marie Perkins and Patricia Perkins, minors, by M. H. Barton, guardian ad litem for said minors, and Ruth Holmes, a minor, and Rufus Holmes as guardian of the Estate of Ruth Holmes, a minor, do have and recover of and from the appellant, Ryan Consolidated Petroleum Corporation, a corporation, and of Trinity Universal Insurance Company, surety upon appellant's appeal bond, all costs in this behalf expended both in this court and the court below for all of which execution may issue and this decision be certified to the court below for observance.

Court of Civil Appeals of Texas

FOR THE SIXTH SUPREME JUDICIAL DISTRICT

ORDER OVERRULING APPELLANT'S MOTION FOR REHEARING

Be it remembered that on Thursday, the 18th day of March, 1954, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, met in the City of Texarkana, Texas. Present: Reuben A. Hall, Chief Justice; I. N. Williams, Associate Justice; Wm. J. Fanning, Associate Justice; and M. E. Merrill, Clerk.

No. A-4650

RYAN CONSOLIDATED PETROLEUM CORPORATION,
Appellant,

v.

W. L. PICKENS, *et al.*,
Appellees.

Appealed from District Court of Wood County

This cause came on to be heard on the transcript of the record and appellant's motion for rehearing, and the Court having inspected said record and duly considered said motion is of the opinion that the said motion should be and the same is hereby overruled.

C-7

No. A-4650

In the

SUPREME COURT OF TEXAS

RYAN CONSOLIDATED PETROLEUM CORPORATION,

v.

W. L. PICKENS, *et al.*,

From Wood County, Sixth District

JUDGMENT

This cause came on again to be heard on motions for rehearing as filed herein by the respondents, and after due consideration of same, it is ordered that the motions be, and are hereby, granted, and that the judgment entered on March 23, 1955, reversing the judgments of the Courts below and remanding the cause to the District Court for further proceedings, be, and is hereby vacated and set aside and the following judgment entered in lieu thereof, to-wit:

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Sixth Supreme Judicial District, and the original transcript as well as the transcript showing the proceedings had in said Court of Civil

Appeals being before the Court, and these having been duly considered, because it is the opinion of the Court that there was no error in the judgments of the Courts below, it is therefore ORDERED, ADJUDGED and DECREED that the judgments of the Court of Civil Appeals and District Court be, and are hereby, in all things affirmed.

It is further ordered that petitioner, Ryan Consolidated Petroleum Corporation, and surety, Trinity Universal Insurance Company, pay all costs in this behalf expended in this Court and the Court of Civil Appeals, and that this decision be certified to the District Court of Wood County, Texas, for observance.

C-9

No. A-4650

In the

SUPREME COURT OF TEXAS

RYAN CONSOLIDATED PETROLEUM CORPORATION,

v.

W. L. PICKENS, *et al.*,

From Wood County, Sixth District

January 11, 1956.

ORDER OVERRULING PETITIONER'S MOTION FOR REHEARING

This day came on to be heard petitioner's motion for rehearing on the opinion and judgment of November 23, 1955, in this cause, and same having been duly considered, it is ordered that the motion be, and is hereby, overruled.